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No._____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1993

KEY TRONIC CORPORATION,

Petitioner,

v.

UNITED STATES ET AL.,

Respondents.

STANTON ROAD ASSOCIATES,

Petitioner,

v.

LOHREY ENTERPRISES, INC., ELECTRONIC VALET SYSTEMS, INC., DAVID LOHREY AND NATHAN PANG,

Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether under the federal Superfund statute, a private party may recover attorneys' fees as response costs when fees are incurred (a) to prepare and negotiate a reasonable scope of work and consent decree related to cleanup of contaminated property; (b) to search for and identify other parties responsible for the contamination; and (c) to litigate cost recovery actions against other responsible parties to compel their participation in the remediation.

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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Key Tronic Corporation[1] and Stanton Road Associates[2] respectfully jointly petition for a writ of certiorari to

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[1]Key Tronic Corporation has no parent company. All of its subsidiaries are wholly owned. Sup. Ct. R. 29.1.

[2]Stanton Road Asociates has no parent company and no subsidiaries. Sup. Ct. R. 29.1.

review the judgments of the United States Court of Appeals for the Ninth Circuit in *Key Tronic Corporation v. United States et al.*[3] and in *Stanton Road Associates v. Lohrey Enterprises et al.*

OPINIONS BELOW

The opinion of the Ninth Circuit in *Key Tronic Corporation v. United States* is reported at 984 F.2d 1025 and is reprinted in Appendix A. The opinion of the district court is reported at 766 F. Supp. 865 and is reprinted in Appendix B.[4] The opinion of the Ninth Circuit in *Stanton Road Assocs. v. Lohrey Enters.* is reported at 984 F.2d 1015 and is reprinted in Appendix C. The opinion of the district court is reported at 1991 U.S. Dist. LEXIS 5630 and is reprinted in Appendix D.

JURISDICTION

The judgments of the Ninth Circuit in both cases were entered on January 28, 1993. On June 7, 1993 the Court denied timely petitions for rehearing (by 2-1 votes) and also denied suggestions for rehearing en banc. Appendices E and F. This Court has jurisdiction to review the decisions by the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, also known as Superfund, provides that private and governmental plaintiffs may recover "necessary costs of response" or "costs of removal or remedial action." 42 U.S.C. § 9607(a)(4)(A), (B).

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[3]The Respondents are the United States of America, the United States Air Force, and Donald B. Rice, the Secretary of the United States Air Force, in his official capacity. Sup. Ct. R. 14.1(b).

[4]The district courts were vested with jurisdiction by 42 U.S.C. §§ 9607(a) and 9613(b). Sup. Ct. R. 14.1(i).

"Response" is defined in CERCLA § 101 to mean "remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25).

STATEMENTS

A. KEY TRONIC CORPORATION'S STATEMENT OF FACTS

This case involves the recovery of costs incurred by Petitioner Key Tronic Corporation ("Key Tronic"). Key Tronic voluntarily performed environmental cleanup measures in a timely manner to protect public health and was then forced, by the recalcitrance of others with similar legal responsibility for the environmental contamination, to investigate and pursue legal remedies against those recalcitrant parties.

Key Tronic acted on its own initiative to protect citizens from exposure to contamination leaching from the Colbert Landfill in Eastern Washington ("Colbert" or "Landfill"). When the contamination was discovered, Key Tronic publicly disclosed its prior use of Colbert and took immediate steps to correct the problem. In contrast, Respondent United States Air Force ("Air Force") had comparable responsibility for the problem, but did not acknowledge its use of Colbert or its contribution to contamination. The Air Force took no action until pursued by Key Tronic. Eight years after Key Tronic responded, the Air Force finally agreed to pay a portion of the costs for the long-term cleanup, pursuant to a remediation plan that Key Tronic previously designed and partially funded.[5]

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[5]The Air Force agreement with the United States Environmental Protection Agency ("EPA") was finalized more than one year after Key Tronic had settled with EPA, and only after the Air Force was adjudged liable to Key Tronic for costs associated with Colbert as a result of Key Tronic's state law contribution action. The Air Force was held liable to Key Tronic in the contribution case on

Key Tronic incurred costs to investigate well contamination and to provide neighboring residents with alternative water supplies.[6] Key Tronic incurred costs in searching for other responsible parties to establish their contribution to the contamination problem. It incurred costs in preparing the remediation plan and Consent Decree, which established the cleanup action to be taken. Finally, it incurred costs in litigating this cost recovery action to require the Air Force and other PRPs to reimburse it for a portion of these costs.[7]

Spokane County ("County") operated the Landfill in Eastern Washington during the 1970s. Appendix B, at 2. During that decade, liquid chemicals were disposed of at the Landfill by a number of entities, including Key Tronic and the Air Force. Appendix A, at 2.

In the fall of 1980, the Washington Department of Ecology ("WDOE") tested drinking water wells in the area surrounding the Landfill and determined that 1,1,1-trichloroethane ("TCA") was present in higher than acceptable quantities. Appendix A, at 2. Appendix B, at 2. WDOE advised residents adjacent to the landfill not to use their well water.

Key Tronic and the County responded promptly to the public health threat posed to neighboring residents, jointly retaining consultants to further evaluate conditions at the Landfill. Extensive well water sampling and analyses were performed in 1982. Beginning in 1983, Key Tronic supplied bottled water to residents adjacent to the landfill and funded installation of a new water system.

November 3, 1989. The Interagency Agreement was finalized on some unspecified date after February 4, 1990.

[6]Those costs, totalling $696,268.06, were not at issue in the Ninth Circuit.

[7]Key Tronic also agreed to pay $4.2 million to fund the long-term cleanup at Colbert. Appendix A, at 2. It dropped its action to compel the Air Force to reimburse it for those costs because the Air Force subsequently agreed to contribute $1.45 million to that effort.

Key Tronic undertook the necessary investigation to identify other potentially responsible parties ("PRPs"), one of which was determined to be the Air Force, for the purpose of assuring that they would participate in the ultimate long-term remedial effort and share costs (the "PRP search"). Key Tronic's efforts in identifying responsible parties and establishing the Air Force's disposal of wastes at Colbert resulted in the EPA's action against the Air Force. Appendix B, at 14, n.4.

Key Tronic also retained counsel and a consultant to work with EPA and WDOE to investigate the site, develop a remedy and draft the scope of work and Consent Decree which established the remediation to be performed at the Landfill. The technical and legal work performed by Key Tronic resulted in agreement with EPA on reasonable and appropriate remedial action.[8]

Key Tronic incurred costs responding to hazards at the Landfill in two different ways. First, it incurred remediation costs on its own initiative before entering the Consent Decree ("pre-Consent Decree costs") and, second, it agreed to pay money pursuant to the Consent Decree ("Consent Decree costs") for further response action. The appeal below concerned only Key Tronic's voluntarily incurred pre-Consent Decree costs, and related enforcement costs. It did not concern Consent Decree costs.

1. Decisions Below

Key Tronic filed the complaint in this cost-recovery action in October 1989. The action named three defendants, including the Air Force.[9] The action asserted both a private cost recovery claim under

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[8]In August 1983, Colbert was designated by EPA as a National Priorities List site under CERCLA § 105. EPA issued its Record of Decision for the Landfill in September 1987.

[9]Key Tronic reached settlement with one of the defendants, Alumax, prior to argument of Key Tronic's motion for summary judgment. Appendix B, at 4. Key Tronic's claim against the other defendant, the Landfill operator, was dismissed

CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), and a contribution claim under CERCLA § 113(f), 42 U.S.C. § 9613(f). The Air Force moved to dismiss both claims against it. The Air Force argued, based on the fact that it had entered into an Interagency Agreement with EPA and WDOE regarding cleanup of Colbert, that it was entitled to contribution protection, under CERCLA § 113(f)(2).

Because the Air Force had executed the Interagency Agreement, Key Tronic acquiesced in the dismissal of its Section 113 contribution claim (i.e., claims for recovery of consent decree costs), and the district court granted summary judgment to Key Tronic on its Section 107 cost recovery claim (i.e., pre-consent decree costs and all enforcement activity costs, including attorneys' fees). Appendix B.

The Air Force and Key Tronic subsequently negotiated the amounts to be paid on all six categories of claimed response costs in a two-step process. First, the parties executed a Consent Decree providing for payment on two categories of costs (well contamination investigation and provision of alternative water supplies) and reserved the other four categories of costs (the "excepted claims") which the Air Force intended to appeal.[10] Second, the parties entered a stipulation regarding the amounts the Air Force would pay on the excepted claims, so that a final judgment could be entered. Appendix A, at 3.

On the Air Force's appeal of the excepted claims, the Ninth Circuit reversed and held that CERCLA does not authorize the

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based on a covenant not to sue that Key Tronic had given the County in the Consent Decree, which extended to county employees, including the Landfill operator. Appendix B, at 3.

[10]The excepted claims included attorneys' fees incurred in negotiating the Consent Decree and scope of work, fees incurred in the PRP search, fees incurred in bringing the cost recovery action, and prejudgment interest on excepted claims. The Air Force did not pursue appeal of the interest claim.

recovery of attorneys fees. Thus the court held that the district court had no authority to award fees in any of the three categories of fees incurred by Key Tronic.

B. STANTON ROAD ASSOCIATES' STATEMENT OF FACTS

This case involves a completely innocent private landowner enforcing the clean-up provisions of CERCLA against a recalcitrant polluter. Petitioner Stanton Road Associates ("Stanton Road") owned a large commercial warehouse office building on property in Burlingame, California. Appendix D, at 2. Respondents owned and operated an industrial dry-cleaning plant on property contiguous to Stanton Road. Appendix D, at 2-3.

For several years through 1988, respondents repeatedly contaminated Stanton Road's property by allowing the hazardous chemical perchloroethene ("PCE") to spill from the dry-cleaning plant onto and beneath Stanton Road's property. Appendix D, at 5-6. Respondents also dumped sludge containing PCE from the dry-cleaning operations onto property leading to Stanton Road's property. Appendix D, at 6.

Upon learning of the contamination in 1988, Stanton Road repeatedly asked respondents to investigate and clean up the contamination. Respondents did not do so. Appendix D, at 6.

In this same time frame, government authorities issued to respondents citations and demands for remediation of the PCE pollution. Respondents did not do so. Appendix D, at 6-7.

For nearly three years respondents ignored every effort by Stanton Road and the government to get them to clean up the contamination they had created. Stanton Road was forced to hire an environmental consultant to deal with the pollution problem, and to pursue litigation as the only available means of forcing respondents to comply with their obligations under state and federal law. Consequently, Stanton Road incurred attorneys fees and costs in

responding to the contamination caused by respondents. Appendix D, at 9.

1. Decisions Below

On March 15, 1989 Stanton Road filed this action in the United States District Court for the Northern District of California pursuant to sections 107 and 113 of CERCLA and pursuant to various state laws. The District Court ruled in favor of Stanton Road on every contested issue. The Court found that respondents were completely responsible for the contamination of Stanton Road's property and that they refused to clean up the property even after both Stanton Road and government officials demanded cleanup. Appendix D, at 6-7.

The Court ordered, *inter alia*, pursuant to CERCLA that respondents pay all response costs incurred up to that point by Stanton Road, including attorneys' fees (allocated so that only the portion under CERCLA was awarded). The district court awarded $126,197.78 in attorneys' fees as one component of Stanton Road's reasonable "response costs" incurred in investigating and successfully prosecuting its CERCLA claims against respondents. Appendix D, at 10-11. The court also granted Stanton Road declaratory relief for all future costs of response. Appendix D, at 11.

On appeal the Ninth Circuit reversed the award of attorneys' fees, holding that any exception to the American Rule must be explicitly authorized by statute and that CERCLA does not contain an explicit authorization.

REASONS FOR GRANTING THE WRIT

A. THERE IS AN INTER-CIRCUIT CONFLICT INVOLVING FIVE CIRCUITS WHICH HAVE RULED ON THE ISSUE

Five circuit courts have ruled on whether CERCLA authorizes recovery of attorneys' fees as response costs in private cost recovery

actions. Two circuits hold that it does, two circuits hold that it does not, and one circuit holds that certain fees may be recoverable while others are not.[11]

1. The Sixth and Eighth Circuits Have Held That CERCLA Authorizes Recovery of Attorneys' Fees in Private Party Response Cost Actions. The Tenth Circuit Permitted Recovery of Certain Fees

The Eighth Circuit in *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991), upheld an award of attorneys' fees as CERCLA response costs.[12] In analyzing whether Congress provided for recovery of attorneys' fees by private cost-recovery litigants, the Eighth Circuit construed §§ 107(a)(4)(B) and 101(25) of CERCLA. Section 107(a)(4)(B) provides that private parties may recover "necessary costs of response." Section 101(25) defines "response" as "remove, removal, remedy, and remedial action . . . [including] enforcement activities related thereto." The Eighth Circuit construed the inclusion of "enforcement activities" in the definition of "response" as express provision for recovery of attorneys' fees:

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[11] At present, petitioners are aware that district court decisions have recently been entered in at least three circuits that have not yet resolved the question, the Third, Fourth and Seventh Circuits. *Keystone Chem. Co. v. Mayer Pollock Steel Corp.*, 1993 U.S. Dist. LEXIS 3733 (E.D. Pa., March 10, 1993) (fees not recoverable); *HRW Sys. Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318 (D. Md. 1993) (fees recoverable); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1281 (E.D. Va. 1993) (fees recoverable); *BTR Dunlop, Inc. v. Rockwell Int'l Corp.*, 1993 U.S. Dist. LEXIS 1720 (N.D. Ill. Feb. 12, 1993) (magistrate's report and recommendation) (fees recoverable). These circuits will likely soon have to address the issue presented by this petition.

[12] The Third Circuit previously awarded attorneys' fees in the prosecution of a private CERCLA action, but that decision was not published in the federal reporter. *Jersey City Redevelopment Auth. v. PPG Indus., Inc.*, 17 Chem. Waste Litig. Rptr. 626, 636 (3d Cir. 1988).

> Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the 'necessary costs' that section 9607(a)(4)(B) allows private parties to recover. We therefore conclude that CERCLA authorizes, with a sufficient degree of explicitness, the recovery by private parties of attorney fees and expenses.

920 F.2d at 1422.[13] This construction, Petitioners maintain, is the proper one.

The Sixth Circuit recently followed the reasoning of *General Electric*. *Donahey v. Bogle*, 987 F.2d 1250, 1256 (6th Cir. 1993), *reh'g, en banc, denied*, (6th Cir. June 15, 1993). In *Donahey*, the purchaser of a contaminated parcel sued the seller and a past lessee of the property after it discovered the contamination, seeking rescission of the sales contract and cost recovery under CERCLA for reimbursement of costs incurred in investigating the contamination and attempting to clean it up. The district court denied recovery of all response costs, including attorneys' fees. The Sixth Circuit reversed the trial court's denial of attorney's fees as response costs under CERCLA. The Sixth Circuit stated:

> [T]his court prefers to follow the reasoning of cases such as *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991), *Shapiro v. Alexanderson*, 741 F. Supp. 472 (S.D.N.Y. 1990), and *General Electric Co. v. Litton*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S.

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[13]Two 1992 Eighth Circuit decisions have followed *General Electric*. *Gopher Oil Co. v. Union Oil Co. of California*, 955 F.2d 519 (8th Cir. 1992); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478 (8th Cir. 1992).

Ct. 1390 (1991). The *Bolin* opinion made the following persuasive statement:

> By providing parties with a federal cause of action for the recovery of necessary expenses in the cleanup of hazardous wastes, Congress intended § 107 as a powerful incentive for these parties to expend their own funds initially without waiting for the responsible persons to take action. [Citations omitted]. The court can conceive of no surer method to defeat this purpose than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs. 759 F. Supp. at 710.

987 F.2d at 1256.

The Tenth Circuit recently followed the Eighth and Sixth Circuits, in part, holding that nonlitigation-related attorneys' are recoverable response costs. *FMC Corp. v. AERO Indus., Inc.*, 1993 U.S. App. LEXIS 17,074 (10th Cir. July 9, 1993). In *FMC Corp.*, a group of responsible parties that had cleaned up a contaminated site pursuant to an EPA order sued another responsible party that had not participated in the cleanup for a variety of response costs. These costs included the costs of conducting the removal action, nonlitigation removal-related attorneys' fees and costs, and litigation fees and costs in bringing the cost recovery action. The trial court held the defendant liable for response costs under CERCLA and allocated the defendant a 25% share of the total response costs, but excluded attorneys' fees.

On appeal, the Tenth Circuit affirmed the 25% allocation and affirmed the district court's denial, under the American Rule of recovery of attorneys' fees incurred in litigating the cost recovery action. *Id.* at p. 6. This portion of the holding thus conflicts with the Eighth and Sixth Circuits and, Petitioners maintain, is incorrect. The Tenth Circuit reached a different conclusion, however, with respect to nonlitigation attorneys' fees, which it held do not fall under the American Rule because they are not incurred in pursuing litigation. The Tenth Circuit concluded that recovery of such fees is not barred as a matter of law. "Rather, the issue is whether nonlitigation attorneys' fees are necessary response costs within the meaning of Section 9607(a)(4)(B)." *Id.* The court concluded that attorneys' fees generated in designing and negotiating the removal action and in preparing and carrying out the work plan approved by the EPA would constitute recoverable response costs if determined to be necessary. *Id.* Accordingly, the court remanded for the district court to determine whether these nonlitigation attorneys' fees were necessary and therefore recoverable response costs.[14]

2. The First and Ninth Circuits Have Held That CERCLA Does Not Authorize Recovery of Attorneys' Fees as Response Costs in Private Party Response Cost Actions. The Tenth Circuit Held That CERCLA Does Not Authorize Recovery of Litigation-Related Attorneys' Fees

In *Stanton Road*, the Ninth Circuit held: "we are persuaded that the words 'enforcement activities' as used in Section 101(25) do not explicitly authorize the payment of attorneys' fees." 984 F.2d at

[14]Under the holding of the Tenth Circuit, two of the three categories of response costs sought by Key Tronic--the PRP search costs and the scope of work and consent decree negotiation costs--would be recoverable if determined to be necessary.

1019. The Ninth Circuit rejected the Eighth Circuit's construction of CERCLA §§ 107(a)(4)(B) and 101(25), stating:

> Attorneys' fees are incurred in every private action to enforce rights embodied in a federal statute where the litigant is represented by counsel. . . . A holding that attorneys' fees are not explicitly authorized in a private response action does not "read them out" of section 9607(a)(4)(B), as suggested by the Eighth Circuit.

Stanton Road, 984 F.2d at 1020; *Key Tronic Corp. v. United States*, 984 F.2d at 1027. What the panel did not acknowledge is that CERCLA, in contrast to most if not all other federal statutes embodying a private right of action, specifically allows private litigants to recover their costs in enforcing the statute, costs that necessarily include attorneys' fees. This was recognized by Judge Canby in his cogent dissent in *Stanton Road*, 984 F.2d at 1023: "If the language of Congress in sections 107(a)(4)(B) and 101(25) is to be given meaning and effect, those fees must be recoverable."

The First Circuit also specifically rejected the Eighth Circuit's approach. *In re Hemingway Transport, Inc.*, 993 F.2d 915 (1st Cir. 1993) *petition for cert. filed*, 62 U.S.L.W. 3114 (U.S. Aug. 17, 1993) (No. 93-187). *Hemingway* involved a claim for CERCLA response costs against parties who had filed in bankruptcy. The bankruptcy court awarded the plaintiff $38,000 as response costs but disallowed $54,000 in attorneys' fees, holding that these were not recoverable response costs. The district court affirmed. On appeal, the First Circuit rejected the argument that the term "necessary costs of response" should be construed to encompass attorneys' fee awards, stating: "Absent an explicit statutory authorization, a party is not entitled to recover attorneys' fees simply because it prevailed in the litigation." 993 F.2d at 934. Plaintiff disputed that all $54,000 was incurred in the cost recovery litigation itself, asserting that the greater portion of fees was incurred to ensure that plaintiff's

response was in compliance with EPA's order compelling cleanup. The First Circuit held:

> We conclude that the present claim was waived. At trial, [plaintiff's] attorney fee billings were admitted in evidence. [Plaintiff] suggested no distinction between attorneys' fees incurred for litigative and administrative purposes. [Plaintiff's] failure to advance the present contention below deprived the bankruptcy court of an opportunity to consider it, thereby waiving the claim.

Id. at 935. *Hemingway* might have presented a case similar to *FMC Corp.*, *supra*, and to *Key Tronic*, where a portion of claimed attorneys' fees did not relate to the cost recovery litigation itself, but related to the implementation of the removal or remedial action. However, the First Circuit did not reach the question of whether nonlitigation-related fees should be treated differently than those incurred in prosecuting a cost recovery action.

The Tenth Circuit, in *FMC Corporation v. AERO Industries*, *supra*, held that litigation-related fees were not recoverable response costs based on the American Rule. 1993 U.S. App. LEXIS 17074 at p. 6.

B. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE

1. Protection of Human Health and the Environment Is at Stake

The questions presented in this case are of national importance. In passing the Superfund statute, Congress recognized the need to clean up the numerous heavily contaminated sites, created from decades of waste disposal practices that are no longer tolerated by

modern environmental laws. The task of promoting cleanup of the estimated 35,000 such sites[15] is beyond the resources of EPA, the responsible enforcement agency. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989). The only possible means of promoting cleanup of these tens of thousands of polluted sites is through cleanup actions initiated by private parties. *Id. See also* Knopf, *Breaking New Ground: Recovery of Transaction Costs in Private CERCLA Cost-Recovery Actions*, 28 Willamette L. Rev. 495, 511 (1992).

Congress provided the mechanism to facilitate private-party cleanup in CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), by allowing private parties to undertake cleanup actions and then recover costs from the parties responsible for contributing to the contamination. The Ninth Circuit below construed "necessary costs of response" to exclude attorneys' fees despite the fact that such costs are necessarily incurred in responding to Superfund cleanups.

In so concluding, the Ninth, First and Tenth Circuits incorrectly construe the statute's language and frustrate Congressional intent. The Court should resolve the clear inter-circuit conflict on this important issue.

2. Prompt High Court Resolution of This Frequently Litigated Issue of Statutory Construction Is Essential to End Confusion Among Lower Courts

The many courts nationwide faced with the question presented in this case are divided in resolving the issue.[16] This Court's

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[15] As of August 1991, the federal government's database of contaminated sites, the Comprehensive Environmental Response, Compensation and Liability Information System ("CERCLIS"), listed 35,000 such sites. See 5 Superfund No. 17 (1991 Predicasts).

[16] Decisions from federal district courts in favor of allowing the recovery of attorneys' fees have come from district courts in Maryland, Michigan, Illinois,

guidance is needed to avoid the wasting of further judicial and private resources as federal district courts follow conflicting circuit court precedents. This confusion affects vast numbers of individuals and businesses, a large number of Superfund sites, and millions of dollars in remediation and related litigation costs. Moreover, with the present conflict, cost recovery litigants have incentive to forum shop for a forum that recognizes that fees are recoverable response costs.[17]

Virginia, Louisiana, Kansas, California, New York and Kentucky. *HRW Sys., Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318 (D. Md. 1993); *Hastings Bldg. Prods., Inc. v. National Aluminum Corp.*, 815 F. Supp. 228 (W.D. Mich. 1993); *BTR Dunlop, Inc. v. Rockwell Int'l Corp.*, 1993 U.S. Dist. LEXIS 1720 (N.D. Ill. Feb. 12, 1993); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1281 (E.D. Va. 1993); *Joy v. Louisiana Conference Ass'n of Seventh-Day Adventists*, 1992 WL 165670 (E.D. La. July 6, 1992); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991); *Pease & Curren Ref., Inc. v. Spectrolab Inc.*, 744 F. Supp. 945 (C.D. Cal. 1990); *Shapiro v. Alexanderson*, 741 F. Supp. 472 (S.D.N.Y. 1990); *Lykins v. Westinghouse Elec. Corp.*, 27 Env't Rep. Cas. (BNA) 1590 (E.D. Ky. 1988). Federal district courts in Pennsylvania, Colorado, Oklahoma, New Hampshire, Rhode Island, and New Jersey have denied recovery of fees. *Keystone Chem. Co. v. Mayer Pollock Steel Corp.*, 1993 U.S. Dist. LEXIS 3733 (E.D. Pa. March 10, 1993); *AT&T Technologies, Inc. v. Heleva*, 1990 WL 76616 (E.D. Pa. June 6, 1990); *Fallowfield Dev. Corp. v. Strunk*, 1990 WL 52745 (E.D. Pa. Apr. 23, 1990); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468 (D. Colo. 1991); *United States v. Hardage*, 750 F. Supp. 1444 (W.D. Okla. 1990); *Mesiti v. Microdot Inc.*, 739 F. Supp. 57 (D.N.H. 1990); *Regan v. Cherry Corp.*, 706 F. Supp. 145 (D.R.I. 1989); *T&E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696 (D.N.J. 1988); *BCW Assocs. Ltd. v. Occidental Chem. Corp.*, 1988 WL 102641 (E.D. Pa. Sept. 29, 1988).

[17]CERCLA permits cost recovery actions in either the "district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office." 42 U.S.C. § 9613(b).

CONCLUSION

For the reasons stated, Petitioners respectfully request that the Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED this 3rd day of September 1993.

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APPENDIX A

KEY TRONIC CORPORATION, a Washington Corporation, Plaintiff-Appellee,

v.

UNITED STATES of America, United States Department of the Air Force; Donald B. Rice, Secretary of the United States Air Force, in his official capacity, Defendants-Appellants.

No. 91-36021.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 2, 1992.

Decided Jan. 28, 1993.

Before: SNEED, ALARCON and CANBY, Circuit Judges.

ALARCON, Circuit Judge:

The United States Air Force (Air Force) appeals from the award of $155,500 in attorneys' fees to Key Tronic Corporation (Key Tronic) in this private response cost recovery action. The district court held that the Air Force was liable to pay to Key Tronic attorneys' fees as necessary response costs for prosecuting this private response cost recovery action in the district court, for legal expenses incurred searching for other potentially responsible parties liable for the cleanup, as well as legal expenses incurred in the preparation and negotiation of a consent decree between Key Tronic and the United States Environmental Protection Agency (EPA). The Air Force contends that the district court erred in concluding that these legal expenses incurred by Key Tronic were necessary response costs compensable under section 107(a)(4)(B) of CERCLA. We agree and reverse the award of attorneys' fees.

I.

PERTINENT FACTS

The Air Force disposed of liquid chemicals at Colbert Disposal Site (Colbert) from 1975 to 1980. Key Tronic also disposed hazardous waste at Colbert. In 1980, the Washington Department of Ecology (DOE) tested the drinking water wells around Colbert and found that they were contaminated.

Key Tronic alleged that it incurred, at its own initiative, expenses totaling $1,271,511.10 in cleanup costs. Key Tronic subsequently entered into a consent decree with the EPA and DOE. The decree required Key Tronic to pay the EPA $4.2 million in response costs.

The Air Force also stipulated with the EPA and DOE to the entry of a consent decree. The Air Force agreed to pay the EPA $1.45 million for the clean up of Colbert. The EPA released the Air Force from any further liability, and granted the Air Force the "contribution protection" authorized by 42 U.S.C. § 9622(g)(5).[1] Pursuant to this section, the Air Force was freed from liability for contribution claims made by other parties regarding matters addressed in the settlement between the Air Force and the EPA. 42 U.S.C. § 9622(g)(5).

Key Tronic filed the present private response cost recovery action against the Air Force for 1) contribution for the $4.2 million it was obligated to pay under its consent decree with the EPA, and 2) an award of $1.2 million for response costs it incurred prior to its settlement with the EPA. Key Tronic contended that it incurred five different types of response costs: 1) remediation costs at the site prior to the EPA's involvement; 2) attorneys' fees expended trying

[1]Section 9622(g)(5) provides, in pertinent part: "[a] party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement."

to identify other potentially responsible parties (PRP's) liable for the clean up under CERCLA; 3) attorneys' fees for negotiating the scope of the remedial action with the EPA; 4) attorneys' fees for the present action; and 5) prejudgment interest.

The Air Force moved to dismiss the complaint. The district court dismissed Key Tronic's contribution claim against the Air Force relating to Key Tronic's $4.2 million liability for the consent decree on the ground that it was barred by the Air Force's consent decree. The court denied the motion to dismiss Key Tronic's claim for the $1.2 million in response costs. The court ruled that because Key Tronic's $1.2 million claim was a direct action to recover its own response costs as authorized by section 107(a)(4)(B), it was not barred by the "contribution protection" the EPA granted the Air Force.

After the entry of the order regarding the motion to dismiss, the Air Force and Key Tronic negotiated a consent decree and resolved all the issues of Key Tronic's claims for response costs from the Air Force except for the claim for attorneys' fees and prejudgment interest.

The district court determined that section 107(a)(4)(B) permits private parties to recover attorneys' fees as necessary response costs. 766 F. Supp. 865 (E.D. Wash. 1991). It also awarded prejudgment interest. The Air Force did not appeal from the award of prejudgment interest.

II.

DISCUSSION

A. ATTORNEYS' FEES ARE NOT AUTHORIZED BY CERCLA

The Air Force argues that CERCLA does not authorize courts to award attorneys' fees to a private litigant for legal expenses incurred in connection with cleanup activities or in prosecuting a response

cost recovery action. The Air Force also contends that Key Tronic is not entitled to recover attorneys' fees because it contributed to the contamination of the site. In *Stanton Rd. Assoc. v. Lohrey Enter.*, 984 F.2d 1015 (9th Cir. 1993), we held that a litigant cannot recover in a private response cost recovery action attorneys' fees from a party that was responsible for the pollution. *Id.* at 1020. Thus, the district court lacked the authority to award attorneys' fees in this matter even if Key Tronic did not contribute to the contamination at Colbert.

B. VALIDITY OF THE AWARD OF ATTORNEYS' FEES FOR THE SEARCH FOR OTHER RESPONSIBLE PARTIES

In addition to awarding attorneys' fees for the litigation expenses incurred by Key Tronic in employing outside counsel for the prosecution of this private cost recovery action, the district court also included in its lump sum award an amount for the legal expenses incurred by Key Tronic in conducting an investigation to search for other persons or entities responsible for the pollution. Key Tronic asserts that "the same authority that allows for the recovery of attorneys' fees in the prosecution of a private enforcement action applies to the recovery of costs for the search of other potentially responsible parties." As discussed above, CERCLA does not authorize an award of attorneys' fees in a private response cost recovery action. *Id.* at 1020. Accordingly, the district court lacked the authority to enter an award for the legal expenses incurred by Key Tronic in searching for other potentially responsible parties, whether performed by outside counsel or its general counsel.

C. VALIDITY OF AN AWARD FOR LEGAL EXPENSES IN NEGOTIATING AND PREPARING THE CONSENT DECREE

The district court included in its award of attorneys' fees an amount to cover legal expenses incurred in the employment of outside counsel and the services performed by Key Tronic's general

counsel in preparing and negotiating a consent decree. In support of this award, Key Tronic relies on *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 1390, 113 L. Ed. 2d 446 (1991). In that matter, the Eighth Circuit construed section 107(a)(4)(B) as authorizing an award of attorneys' fees in a private cost recovery action. *Id.* at 1422. In *Stanton Rd.*, we declined to adopt the Eighth Circuit's interpretation of the words "necessary response cost" as including an authorization for the award of attorneys' fees. *Stanton Rd.*, 984 F.2d 1015, 1020. The district court erred in awarding attorneys' fees to Key Tronic for its legal expenses in preparing and negotiating the consent decree.

CONCLUSION

Because Congress has not explicitly authorized private litigants to recover their legal expenses incurred in a private cost recovery action, that portion of the district court's judgment awarding attorneys' fees is REVERSED.

CANBY, Circuit Judge, dissenting:

Section 107(a)(4)(B) of CERCLA, 42 U.S.C. § 9607(a)(4)(B), authorizes certain persons who clean up hazardous waste sites to recover "necessary costs of response." In 1986, Congress amended the definition of "response" in section 101(25) to include "enforcement activities relating thereto." 42 U.S.C. § 9601(25). For reasons fully stated in my dissent in *Stanton Road Associates v. Lohrey Enterprises, Inc.*, 984 F.2d 1015, 1020, 1028 (9th Cir. 1993), I conclude that the 1986 amendment was intended to authorize the recovery of attorneys' fees along with cleanup costs.

Because the majority bases its decision on the proposition that attorneys' fees are not recoverable under sections 107(a)(4)(B) and 101(25), I dissent. Having registered my disagreement with the foundation of the majority's opinion, I find no need to address the questions of the recoverability of fees for the search for other responsible parties, or for negotiation or preparing the consent decree.

APPENDIX B

KEY TRONIC CORPORATION, a Washington corporation, Plaintiff,

v.

UNITED STATES of America, United States Air Force; Donald B. Rice, the Secretary of the United States Air Force, in his official capacity; Alumax, Inc., a Delaware corporation, Alumax Fabricated Products, Inc., a Delaware corporation, and Alumax Mill Products, Inc., a Delaware corporation, Defendants.

No. CS-89-694-JLQ.

United States District Court,
E.D. Washington.

March 19, 1991.

As Amended Aug. 12, 1991.

ORDER RE: PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

QUACKENBUSH, Chief Judge.

BE[illegible]E THE COURT is defendant United States' Motion for Enlargement of Time (Ct.Rec. 107), the plaintiff's Motion For Summary Judgment Re: Contribution Claim (Ct.Rec. 99), the plaintiff's Motion For Summary Judgment that Alumax is a Covered Person (Ct.Rec. 103), the plaintiff's Motion for Partial Summary Judgment that Response Costs are Recoverable (Ct.Rec. 94), and defendant United States' Motion to Stay (Ct. Rec.113), heard with

oral argument on March 11, 1991. Mark Schneider and Kathryn Tucker represented the plaintiff. Leslie Nellermoe and William Maer represented defendant Alumax. Eileen McDonough represented the United States Air Force. Having reviewed the record, heard from counsel, and fully considered these matters, the court enters this order to memorialize its oral rulings on these motions.

FACTUAL BACKGROUND

From 1968 to 1986 Spokane County maintained the Colbert Disposal Site ("Colbert") in Spokane County, Washington. From the early 1970s through 1980, the County contracted to have defendant William Schmidt do the work necessary to construct, improve and complete the landfill. In that capacity, Schmidt accepted and disposed of refuse at Colbert. Key Tronic alleges that between 1975 and 1980, Schmidt accepted liquid chemicals from the United States Air Force ("USAF"), Alumax Fabricated Products, Inc. and Alumax Mill Products, Inc. (hereafter collectively "Alumax"), and Key Tronic Corporation, and, therefore, that Key Tronic is entitled to contribution and cost recovery from the USAF and Alumax for monies it paid and expended under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*

In 1980 drinking water wells around Colbert were found to be contaminated by various chemicals including "TCA" and "TCE." It is not disputed that Key Tronic had deposited such materials at Colbert. Key Tronic alleges that it incurred, at its own initiative, expenses totaling $1,271,511.10 responding to that discovery. Key Tronic subsequently entered into a Consent Decree and Scope of Work statement with the Washington Department of Ecology ("DOE") and the United States Environmental Protection Agency ("EPA"); as part of that decree, Key Tronic agreed to pay $4.2 million in clean-up costs. The Air Force also entered into a consent decree with DOE and EPA in which the Air Force agreed to pay EPA $1.45 million to resolve its liabilities with the EPA for the Colbert cleanup.

On August 9, 1990, the court entered an order (Ct.Rec. 67) relating to the parties' motions for summary judgment. The court dismissed Key Tronic's contribution claims against the USAF relating to Key Tronic's $4.2 million in liability from the consent decree; however, the court did not dismiss Key Tronic's claim against the USAF for contribution relating to the $1.2 million incurred independently by Key Tronic. The court granted in part Key Tronic's motion for partial summary judgment against the USAF, and held that Key Tronic had established CERCLA liability against the Air Force. The court denied Key Tronic's motion for summary judgment against Alumax and held that Key Tronic had not met its burden of proof in establishing that there was no triable issue of fact as to Alumax's liability under CERCLA. The court dismissed the claims against defendant Schmidt.

The United States and Key Tronic subsequently negotiated a consent decree which was signed by this court on January 14, 1991. *See* Ct.Rec. 92. The consent decree resolved all but the following issues of response cost liability between the United States and Key Tronic:

A. Costs and fees incurred by attorneys and investigators for Key Tronic in the amount of $365,649 during Key Tronic's search for additional potentially responsible parties and costs and fees incurred by attorneys related to the negotiation of the Consent Decree between Key Tronic, the United States, and the State of Washington in *The State of Washington v. County of Spokane*, CS-89-033-RJM;

B. The salary of David Powers, Key Tronic's General Counsel and Secretary, in the amount of $70,000 for time spent supervising the search for additional potentially responsible parties and negotiating the Consent Decree identified in A;

C. Attorneys' fees and costs incurred by Key Tronic in the prosecution of this action; and

D. Prejudgment interest on excepted claims.

Ct.Rec. 92, pp. 2-3.

Key Tronic now brings the following motions for summary judgment. First, Key Tronic moves for summary judgment that its $4.2 million in liability from the consent decree constitutes "recoverable" monies under CERCLA Section 113, 42 U.S.C. § 9613, for purposes of its contribution claim against Alumax. Second, Key Tronic moves for summary judgment that Alumax disposed of hazardous wastes at the Colbert landfill. Third, Key Tronic moves for summary judgment that its independent response costs of $1.2 million are recoverable under CERCLA.

At oral argument, the plaintiff and defendant Alumax informed the court that all claims against defendant Alumax had been settled, and, therefore, that oral argument on the motions as they related to Alumax was unnecessary. The plaintiff and defendant United States informed the court that, should the court rule against the United States, they had stipulated to the quantum of liability and that they would subsequently submit that stipulation to the court.

DISCUSSION

I. MOTIONS DIRECTED SOLELY AGAINST DEFENDANT ALUMAX

Because of the settlement between Key Tronic and Alumax, two of Key Tronic's motions have been mooted. Therefore, Key Tronic's motion that the $4.2 million consent decree is recoverable under CERCLA for contribution purposes, and Key Tronic's motion that Alumax is a covered person under CERCLA ARE HEREBY DENIED AS MOOT.

II. RECOVERABILITY OF "RESPONSE COSTS"

Key Tronic moves this court to hold that monies it spent independently of the Consent Decree are recoverable under

CERCLA as "response costs." By the January 1991 consent decree between Key Tronic and the Air Force, Key Tronic has waived all claims against the United States except for the four items contested. Because Key Tronic has settled its claims with Alumax, these excepted items are the sole remaining claims at issue.

Key Tronic contends the following claims are recoverable from the Air Force under CERCLA as "response costs": (1) prejudgment interest for any liability assessed against the USAF from these motions; (2) attorneys' fees for prosecuting this action; (3) attorneys' and investigators' fees, and opportunity costs of Key Tronic's executive resulting from the search for other potentially responsible parties; and (4) attorneys' fees and opportunity costs of Key Tronic's executive related to the negotiation of the consent decree.[1]

A. Prejudgment Interest Against the USAF

CERCLA waives sovereign immunity with the following statutory provision:

> **Application of Act to Federal Government.** (1) In general. Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act.

42 U.S.C. § 9620(a)(1). CERCLA also provides that prejudgment interest in cost recovery actions is available:

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[1]Because the parties have stipulated to the quantum of liability for these items, the court will address solely the legal issue of recoverability of these items.

> The amounts recoverable in an action under this section shall include interest on the amounts recoverable under [the preceding paragraphs].

42 U.S.C. § 9607.

Based on the foregoing provisions, Key Tronic contends that prejudgment interest may be awarded against the United States Government.

[1] The Government asserts that prejudgment interest may not be awarded against it for sovereign immunity reasons. Absent express congressional consent to the award of interest in addition to a general waiver of immunity to suit, the United States is immune from an interest award. *Library of Congress v. Shaw*, 478 U.S. 310, 106 S. Ct. 2957, 92 L. Ed. 2d 250 (1986). The Government contends that CERCLA does not contain an express waiver of immunity from prejudgment interest as required by *Shaw*, and the general waiver of liability, despite its reference to Section 107 of CERCLA, is legally inadequate to award prejudgment interest.

[2] The court finds the Government's argument to be unpersuasive. *Shaw* involved a statute which provided that the United States shall be liable for costs as a private individual; the statute in *Shaw* did not make any reference to prejudgment interest. The face of 42 U.S.C. § 9620 makes quite clear that Congress waived its sovereign immunity and intended for the Government to be treated as any other private defendant. CERCLA clearly states that in cost recovery actions under § 107 the plaintiff may recover prejudgment interest. Thus, this court holds that CERCLA allows prejudgment interest as an element of damages against the United States.

B. Attorneys' Fees for Prosecuting this Action

[3] Attorneys' fees may not be recovered without a specific statutory provision allowing such a recovery. *Alyeska Pipeline Co. v.*

Wilderness Society, 421 U.S. 240, 262, 95 S. Ct. 1612, 1624, 44 L. Ed. 2d 141 (1975). CERCLA does not have a provision which specifically states that enabling plaintiff is entitled to recover "attorney's fees." Liability of responsible parties under § 107 includes the necessary costs of response resulting from a hazardous waste release or threatened release. 42 U.S.C. § 9607. In the definitions section, "respond or response means remove, removal, remedy, and remedial action, all such terms (including the terms remand and remedial action) include *enforcement activities related thereto*." (emphasis supplied) 42 U.S.C. § 9601(25). CERCLA does not define "enforcement" or "enforcement activity."

CERCLA permits citizens who sue under the citizens' suit provision, 42 U.S.C. § 9659, to obtain relief from a district court. The court may not award money damages but may grant such relief in order to correct the violations and may impose civil penalties. The court may award to the prevailing party the costs of litigation, including attorneys' fees. 42 U.S.C. § 9659(f).

CERCLA provides special recovery measures for the United States Government. Section 107 permits the United States to recover all removal or remedial costs incurred which are not inconsistent with the national contingency plan. "Removal" costs are defined as including any actions taken under Section 104(b) of the Act. 42 U.S.C. § 9601(23). Section 104(b) permits the Government to incur legal costs and to recover those costs. 42 U.S.C. § 9604(b)(1). Case law establishes that the United States may recover its litigation costs under CERCLA. *United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823, 851 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848, 108 S. Ct. 146, 98 L. Ed. 2d 102 (1987); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1009 (D.S.C. 1986), *aff'd in part and vacated in part*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106, 109 S. Ct. 3156, 104 L. Ed. 2d 1019 (1989).

Key Tronic asserts that it is entitled to its legal fees because the attorneys' fees required to bring this § 107 cost recovery action are

"enforcement costs" recoverable as a necessary response cost. Key Tronic first cites two cases in which the Ninth Circuit characterized a Section 107 cost recovery claim by a private party as a "private enforcement action." *Cadillac Fairview, Inc. v. Dow Chemical Co.*, 840 F.2d 691, 694 (9th Cir. 1988); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986). From these cases Key Tronic contends that the recovery of attorneys' fees through the enforcement cost language has already been resolved. However, the Ninth Circuit's characterization of the cost recovery action appears to be dicta as the holdings of those cases did not turn upon the enforcement action language.

Some courts addressing this issue have held that attorneys' fees are recoverable. For example, in *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415 (8th Cir. 1990), the Eighth Circuit held that a private party bringing a cost recovery action under § 107 could recover attorneys' fees for bringing the action. In that case, General Electric purchased a piece of land on which Litton had previously dumped toxic wastes. GE entered into a settlement agreement with the state authorities, agreed to clean up the waste site, and subsequently sued Litton for its response costs pursuant to Section 107 of CERCLA. In holding that attorneys' fees were recoverable, the court gave the following rationale:

> [CERCLA] defines "response" as "remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." A private party cost-recovery action such as this one is an enforcement activity within the meaning of the statute. Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the "necessary costs" that section 9607(a)(4)(B) allows private parties to recover. We therefore conclude that CERCLA

> authorizes, with a sufficient degree of explicitness, the recovery by private parties of attorney fees and expenses. This conclusion based on the statutory language is consistent with two of the main purposes of CERCLA--prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party. These purposes would be undermined if a non-polluter (such as GE) were forced to absorb the litigation costs of recovering its response costs from the polluter. The litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site. (citations omitted)

920 F.2d at 1422. Two district courts have reached the same result with similar reasoning. *Pease & Curren Refining, Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945 (C.D. Cal. 1990); *Shapiro v. Alexanderson*, 741 F. Supp. 472, 480 (S.D.N.Y. 1990).

Other district courts have held that attorneys' fees are not recoverable under CERCLA. *United States v. Hardage*, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990); *Fallowfield Development Corp. v. Strunk*, 1990 WESTLAW 52745, *5-6* (E.D. Pa. 1990); *Mesiti v. Microdot, Inc.*, 739 F. Supp. 57, 62-63 (D.N.H. 1990); *Regan v. Cherry Corp.*, 706 F. Supp. 145, 149 (D.R.I. 1989); *T & E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 708 (D.N.J. 1988); *BCW Associates v. Occidental Chemical Corp.*, 1988 WESTLAW 102641, *23 (E.D. Pa. 1988); *Hemingway Transportation, Inc. v. Khan*, 108 B.R. 378, 383 (Bkrtcy. D. Mass. 1989). One of the leading cases for this position is *T & E Indus., Inc. v. Safety Light Corp., supra*. Like the facts in *Litton*, T & E unknowingly purchased property with a hazardous waste site. T & E sued Safety Light, a successor to the original polluter, for both its cleanup costs and attorneys' fees as response costs. The court held that CERCLA generally intended to distinguish between costs recoverable to the government and those recoverable by private entities. *Id.* at 707-8.

The court found that while the government could obtain attorneys' fees pursuant to § 104(b), private parties had no comparable entitlement. *Id.* Without further explanation, the court rejected the plaintiff's argument that attorneys' fees for bringing the action were recoverable as enforcement activities related to response expenditures on the basis that private parties cannot incur enforcement costs. *Id.* at 708, n. 13.

Another court rejecting attorneys' fees in cost-recovery actions emphasized the legislative history related to the amendment to the Act which added the "enforcement activities thereto" language. *Fallowfield Development Corp. v. Strunk*, 1990 WESTLAW 52745 (E.D. Pa. 1990). The Committee on Energy and Commerce had made the following comments on § 101:

> The section also modifies the definition of "response action" to include related enforcement activities. The change will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties.

H.R. Rep. No. 253, 99th Cong., 1st sess., pt. 1, at 66-67 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News, 2835, 1848-49. From that language the court concluded that when Congress expanded the definition of response costs to include enforcement costs, Congress did not intend for private parties to obtain attorneys' fees as part of a cost recovery action. *Fallowfield*, 1990 WESTLAW 52745, at *6.

In this case, the Government contends that CERCLA's statutory scheme, taken as a whole, evidences a Congressional intent to provide attorneys' fees for the Government but not for private parties. First, the Government points out that CERCLA does not explicitly authorize attorneys' fees as part of a § 107 cost-recovery claim. In contrast, Congress explicitly provided for attorneys' fees for citizen's suits, 42 U.S.C. § 9659, and for response actions by the United States, 42 U.S.C. § 9604. The Government argues, therefore,

that when Congress wanted to provide for attorneys' fees, it did so explicitly, and the failure to make such a provision in § 107 demonstrates the Congressional intent to deny attorneys' fees under Section 107.

The Government further asserts that the statute, taken as a whole, shows that only the Government may bring an "enforcement action." The Government asserts that an enforcement action is an action to compel compliance with CERCLA. The United States may bring such an action under § 104 or § 106 (and private citizens under § 310), but private parties may only bring contribution actions under § 113 or cost recovery claims under § 107. The Government also relies upon the two sentences of the legislative history cited by the *Fallowfield* court. Thus the Government contends that even if the court rejects the Government's argument that attorneys' fees are unavailable because of a lack of explicit statutory authority under § 107, attorneys' fees are nevertheless unrecoverable because a private party cannot incur costs of enforcement activities.

[4,5] The court rejects both of the Government's contentions. As an initial matter, "CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment, courts are obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes in the absence of a specific congressional intent otherwise." *Wilshire Westwood Assoc. v. Atlantic Richfield*, 881 F.2d 801, 804 (9th Cir. 1989) (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)). "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created." *Pinole Point Properties v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 287 (N.D. Cal. 1984) (quoting *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982). Thus, absent specific Congressional intent to the contrary, CERCLA should be interpreted liberally to permit recovery associated with identifying of potentially responsible parties and forcing those responsible parties to share their fair portion of the cleanup of a hazardous waste site.

The court must reject the Government's "express statutory authorization" argument. *Alyeska*, *supra*, stood for the proposition that the federal courts may not award attorneys' fees in the complete absence of any statutory authority. 421 U.S. at 269, 95 S. Ct. at 1627. In that case the Court of Appeals had found that the case did not fit into any of the recognized exceptions to the "American rule" but nevertheless awarded attorneys' fees because the litigation had been beneficial to the public and had ensured that the governmental system functioned properly. *Id.* at 245, 95 S. Ct. at 1615-16. The Supreme Court held that a judicially created rule awarding attorneys' fees was improper and therefore reversed the decision by the Court of Appeals. *Id.* at 269-70, 95 S. Ct. at 1627-28.

Unlike *Alyeska*, the plaintiff in this case points to a statutory provision which entitles the recovery of all necessary response costs. The statute defines response costs as including "enforcement activities." 42 U.S.C. § 9601(25). Thus, the issue for the court is only whether a private party can incur enforcement costs.

The court finds that a private party may incur enforcement costs, and, therefore, may recover attorneys' fees for bringing a cost recovery action under § 107. Congress drafted Section 101(25) to establish the scope of response costs recoverable throughout CERCLA; thus, the definition of response, on its face, applies to both the Government and private parties. Congress failed to restrict "enforcement activities" in that definition to governmental actions.

Although the court acknowledges the force of the Government's position that the statutory scheme implies that enforcement activities are those actions taken by the EPA to require compliance with CERCLA, the court must construe the provisions of § 107 and § 101(25) liberally to achieve the overall objectives of the statute.[2]

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[2]The court notes that the two sentences of legislative history cited by the Government fail to make any reference to private parties. The court cannot conclude from these statements that Congress intended to deny recovery to private parties for enforcement activities.

The court further finds that the cases cited, infra p. 869-870, are more persuasive. Read as a whole, the statute clearly meant for those responsible for dumping chemical wastes to pay for the cleanup of those wastes. If the court narrowly read the statute as the Government suggests, then even innocent purchasers of property who clean up hazardous wastes and subsequently seek recovery from the responsible parties would be unable to recover the entirety of the expenses incurred in holding the responsible parties accountable for their pollution.[3] Accordingly, the court concludes that enforcement costs must be read broadly, and thus includes therein attorneys' fees for making responsible parties share necessary response costs.

C. PRP Search Costs

Key Tronic also seeks to recover the costs of its executive, outside investigators' fees, and attorneys' fees relating to the search for potentially responsible parties. The Government acknowledges that PRP search costs are recoverable when sought by the EPA when enforcing CERCLA. Both parties acknowledge that the case law does not specifically discuss a private party's PRP search costs.

[6] The court finds its holding on enforcement activities and expenses recoverable thereunder to be applicable. Having held that the enforcement cost language of CERCLA must be read broadly, this court concludes that the search for responsible parties is an

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[3]The court is not persuaded that *Litton* should be read as a clean-hands case. If enforcement costs were read to cover only the Government's expenses in compelling compliance with the statute, then persons with clean hands who bring cost recovery actions would also be denied a statutory mechanism to recover their attorneys' fees. The court cannot find a statutory basis to justify an analytical distinction between those who have clean hands and bring a cost recovery action and those who do not.

enforcement activity within the meaning of CERCLA.[4] For the reasons articulated by the court in permitting the recovery of the attorneys' fees in bringing this legal action, the court must find the PRP search costs to be recoverable.

D. Costs Incurred by Key Tronic's Attorneys and Executive in Negotiation of the Consent Decree

Courts have held that consultant and legal fees incurred in the investigation of a hazardous waste site are recoverable as necessary response costs. *International Clinical Laboratories, Inc. v. Stevens*, 1990 WESTLAW 43971, 1990 U.S. Dist. LEXIS 3685 (E.D.N.Y. 1990); *BCW Associates v. Occidental Chem. Corp.*, 1988 WESTLAW 102641, 1988 U.S. Dist. LEXIS 11275.

[7] The court finds that the attorneys' fees and executive's opportunity costs in negotiating Key Tronic's consent decree are necessary response costs in cleaning up the Colbert landfill. The court cannot accept the Government's argument that such costs are not recoverable solely because attorneys (as opposed to engineers) carried out work necessary to solving the problems at Colbert.[5] The court further notes that the Government does not contend that these fees are recoverable only as "enforcement activities." Because these expenses were necessary response costs, the court finds that these costs are recoverable under CERCLA.

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[4]Indeed, Key Tronic asserts, and the Government does not refute, that Key Tronic's efforts in identifying responsible parties and establishing the Air Force's disposal of wastes at Colbert resulted in the EPA's action against the Air Force.

[5]The Government did not raise the issue of whether Key Tronic might have been foreclosed from recovering attorneys' fees related to obtaining a consent decree for the same reasons that Key Tronic may not seek contribution for the $4.2 million liability of the consent decree. The Government instead has defended solely on the basis that Key Tronic's attorneys' fees are not response costs.

MOTION TO STAY

The United States moves the court stay its decision on the quantum of damages. The parties having represented that they will submit a stipulation as to the amount of damages, the defendant's motion IS HEREBY DENIED AS MOOT. The parties shall submit their stipulation to the court within 30 days of the entry of this order.

IT IS HEREBY ORDERED:

1. Defendant United States' Motion for Enlargement of Time (Ct.Rec. 107) IS HEREBY GRANTED.

2. The plaintiff's Motion (F)or Summary Judgment Re: Contribution Claim (Ct.Rec. 99) against defendant Alumax IS HEREBY DENIED AS MOOT.

3. The plaintiff's Motion For Summary Judgment that Alumax is a Covered Person (Ct.Rec. 103) IS HEREBY DENIED AS MOOT.

4. The plaintiff's Motion for Partial Summary Judgment that Response Costs are Recoverable (Ct.Rec. 94) IS HEREBY GRANTED as herein stated. Within 30 days of the entry of this order, the plaintiff and defendant United States shall submit their stipulation as to the quantum of liability.

5. Defendant United States' Motion to Stay (Ct.Rec. 113) IS HEREBY DENIED AS MOOT.

IT IS SO ORDERED.

APPENDIX C

STANTON ROAD ASSOCIATES,
Plaintiff-Appellee,

v.

LOHREY ENTERPRISES, Electronic Valet Systems, Inc., David Lohrey, Nathan Pang, Defendants-Appellants.

No. 91-15729.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 2, 1992.

Decided Jan. 28, 1993.

Before: SNEED, ALARCON and CANBY, Circuit Judges.

ALARCON, Circuit Judge:

Appellants Lohrey Enterprises, Inc., Electronic Valet Systems, Inc., David Lohrey, and Nathan Pang (collectively, "Lohrey") appeal from the award of attorneys' fees to Stanton Road under section 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607(a)(4)(B). Lohrey also seeks reversal of the order requiring it to pay $1,100,000 in monetary damages to Stanton Road Associates ("Stanton Road") for deposit in an escrow account to fund the clean-up of Stanton Road's property.

[1,2] This case presents us with two novel issues. First, we must decide whether Congress has explicitly authorized attorneys' fees to private litigants as part of the response costs incurred in

cleaning up property contaminated by a hazardous substance. We are also confronted with the question regarding whether a district court may order a party found liable for contamination to pay monetary damages for deposit in an escrow account to fund the future clean-up of the contamination.

We conclude that Congress has not expressly provided for an award of attorneys' fees to private parties seeking to recoup response costs under CERCLA. We further hold that the order that Lohrey pay $1,100,000 in monetary damages to Stanton Road constitutes an award of future response costs in violation of CERCLA. We reverse the award of attorneys' fees and vacate the order requiring Lohrey to pay $1,100,000 to Stanton Road as monetary damages to fund a future response action.

I.

Lohrey owned and operated a dry cleaning plant on property contiguous to Stanton Road's property. While the dry cleaning plant was in operation, the hazardous chemical perchlorethelene was allowed to spill onto the adjoining alley. The chemical contaminated Stanton Road's property. Stanton Road brought this action seeking declaratory relief and response costs under CERCLA, and damages under pendent state law claims alleging trespass, negligence, and nuisance.

At trial, Stanton Road introduced expert testimony that the clean-up of Stanton Road's property would cost between $775,000 and $1,100,000. Stanton Road also introduced evidence that the minimum amount of funding necessary for an environmental firm to undertake the clean-up would be $1,100,000. Lohrey did not offer any evidence at trial to contradict Stanton Road's testimony regarding the estimated cost of the proposed remediation.

The district court found Lohrey liable for the contamination. The court awarded Stanton Road $77,374 in response costs, $389,925 in damages under the state law claims, and $126,198 in attorneys' fees under CERCLA. Lohrey was also ordered to pay

Stanton Road $1,100,000 to fund the clean-up of Stanton Road's property. That portion of the order provides as follows:

> *Defendants, jointly and severally, are ordered to pay to Stanton the additional sum of one million one hundred thousand dollars ($1,100,000).* Stanton shall deposit said sum in an interest bearing escrow trust account ("Cleanup Escrow") established to implement the remediation of 860 Stanton Road as expeditiously as possible by the environmental consulting firm PES Environmental, Inc. ("PES"). Defendants shall have no control over the Cleanup Escrow fund, other than to monitor the expenditures therefrom. Payments from the Cleanup Escrow fund for cleanup services rendered shall be paid out as invoices are received and word is reviewed and approved by PES principals. Copies of said invoices shall be provided to a party to be designated jointly by all defendants.
>
> The Cleanup Escrow will terminate upon written certification from PES that the 860 Stanton Road property has been remediated in accordance with all relevant regulatory cleanup levels and requirements.
>
> If unused funds remain in the Cleanup Escrow at the time of termination, such funds will be distributed as follows:
>
> First, all unused funds shall be paid out to Stanton in order to satisfy any money damages awarded to Stanton in this judgment that remain unpaid as of the date of the termination of the escrow. . . . *In the event all*

> *monetary damages awarded Stanton* have been satisfied in full upon termination of the Cleanup Escrow, all remaining sums shall be paid out to defendants on a pro rata basis according to the percentage that each defendant paid funds into the original Cleanup Escrow.

(emphasis added).

The judgment was entered on April 15, 1991. Lohrey filed a timely notice of appeal. It did not seek a stay of the judgment until May 29, 1992. The district court denied the motion.

The district court did not indicate in its judgment whether the monetary damages were awarded pursuant to CERCLA or under the pendent state law claims. In an attempt to clarify the basis for the award of monetary damages, we issued an order requesting the district court to enter an order indicating whether its award was based on state law or CERCLA. In response, the district court informed us that it awarded Stanton Road $1,100,000 under both CERCLA and state law.

II.

Attorneys' Fees

[3] Lohrey contends that the district court erred in awarding attorneys' fees to Stanton Road. They argue that CERCLA does not authorize attorneys' fees in private response cost actions. We review the district court's interpretation of CERCLA de novo. *Idaho v. Howmet Turbine Component Co.*, 814 F.2d 1376, 1378 (9th Cir. 1987).

Stanton Road contends that a private litigant may recover attorneys' fees under CERCLA as "necessary costs of response" pursuant to 42 U.S.C. § 9607(a)(4)(B). Section 9607(a) provides in pertinent part:

> [A]ny person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan.

42 U.S.C. § 9607(a). Section 101(25) defines "response" as "remove, removal, remedy, and remedial action, . . . includ[ing] *enforcement activities related thereto*." 42 U.S.C. § 9601(25) (emphasis added). Stanton Road maintains that an action by a private litigant to recover response costs is an "enforcement activity" within the meaning of the statute.

The question whether CERCLA authorizes private parties to recover attorneys' fees as enforcement costs is a matter of first impression in this circuit. The Eighth Circuit has concluded that CERCLA authorizes private parties to recover attorneys' fees as "necessary costs of response." *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1421-22 (8th Cir. 1990), *cert. denied*, _____ U.S. _____, 111 S. Ct. 1390, 113 L. Ed. 2d 446 (1991). The Eighth Circuit reasoned that a "private party cost-recovery action . . . [under section 107(a)(4)(B)] is an enforcement activity within the meaning of the statute." *Id.*

While we characterized an action to recover costs under section 107(a)(4)(B) in *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir. 1988) as a private response action, we were not required to consider in that matter whether CERCLA authorizes a private party to recover its attorneys' fees. In *Cadillac Fairview*, we held that a private litigant may initiate an action pursuant to section 107(a) to recover the costs of testing for contamination and employing a guard service in responding to the hazardous substances, without waiting for governmental action concerning the contaminated site. *Id.* at 694-95.

The district courts in this circuit disagree on the question whether response costs include attorneys' fees incurred by private litigants. *Compare Pease & Curren Refining, Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 952 (C.D. Cal. 1990) (private parties may recover attorneys' fees as costs of response under section 107(a)(4)(B) *with Santa Fe Pac. Realty Corp. v. United States*, 780 F. Supp. 687, 695 (E.D. Cal. 1991) (attorneys' fees are not recoverable as response costs under section 107(a)(4)(B).

Under the American Rule, a prevailing party may not recover attorneys' fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S. Ct. 1612, 1616, 44 L. Ed. 2d 141 (1975). In *Alyeska*, the plaintiffs temporarily halted construction of an oil pipeline in Alaska. *Id.* at 242, 95 S. Ct. at 1614. The Court of Appeals for the District of Columbia awarded attorneys' fees to the plaintiffs. *Id.* at 245, 95 S. Ct. at 1615. The court reasoned that the plaintiffs had vindicated "important statutory rights of all citizens" and had insured that the governmental process had functioned properly. *Id.* Thus, they were entitled to attorneys' fees to encourage private parties to undertake litigation that benefits the public. *Id.* at 245-46, 95 S. Ct. at 1616.

The Supreme Court reversed. The Court instructed that under the American Rule, a prevailing party cannot recover attorneys' fees in the absence of congressional authority. *Id.* at 269, 95 S. Ct. at 1627. The Court stated that it was up to Congress to "carve out specific exceptions" to the general rule against providing attorneys' fees to the prevailing litigant. *Id.* The Court reasoned that a court is not

> free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of

> the public policies involved in particular cases.

Id.

In *Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976), the Court explained that "the law of the United States . . . has always been that absent *explicit* congressional authorization, attorneys' fees are not a recoverable cost of litigation." *Id.* at 185, 96 S. Ct. at 2602 (emphasis added). The Court stated that attorneys' fees cannot be awarded unless "Congress intended to set aside [a] long-standing American rule of law." *Id.* at 185-86, 96 S. Ct. at 2602.

We are persuaded that the words "enforcement activities" as used in section 101(25) do not explicitly authorize the payment of attorneys' fees. Congress has repeatedly demonstrated that it knows how to express its intention to create an exception to the American Rule.

For example, in section 310(f) of CERCLA, congress authorized courts to "award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing party or the substantially prevailing party whenever the court determines such an award is appropriate" in citizen suit actions. 42 U.S.C. § 9659(f). Similarly, section 104(b) of CERCLA provides that the "President . . . may undertake such planning, *legal*, fiscal, [or] economic, . . . to plan and direct response actions [and] to recover the costs thereof." 42 U.S.C. § 9604(b) (emphasis added). When compared to the express provisions for attorneys' fees in these sections of CERCLA, the term "enforcement activities" would appear to be "outside even the most exhaustive lexicon of customary fee shifting language." *Santa Fe Pac. Realty*, 780 F. Supp. at 695. Moreover, the fact that those district courts that have confronted this issue disagree on the question whether attorneys' fees are allowable under section 101(25) and 107(a)(4)(B) demonstrates that the words "enforcement activities" do not explicitly signal, with any persuasive degree of clarify, that Congress intended to provide for an award of

attorneys' fees to private litigants. *See Litton*, 920 F.2d at 1422 n. 10 (noting that district courts have split on whether attorneys' fees are recoverable by private parties as a necessary cost of response).

[4,5] Ordinarily, where there is a dispute regarding whether a statute applies to the facts before the court, we first look to the plain meaning of the language used by Congress. *Wilshire Westwood Assoc. v. Atlantic Richfield*, 881 F.2d 801, 803 (9th Cir. 1989). If the words used in the statute are ambiguous, however, we must consult the legislative history to determine the intent of Congress. *Blum v. Stenson*, 465 U.S. 886, 896, 104 S. Ct. 1541, 1548, 79 L. Ed. 2d 891 (1984). The rule set forth in *Alyeska* and *Runyon*, however, precludes us from implying from ambiguous language an intent that attorneys' fees can be awarded in a private response action. Under *Alyeska* and *Runyon*, the American Rule must be applied unless Congress explicitly authorizes the courts to award attorneys' fees. *Alyeska*, 421 U.S. at 269, 95 S. Ct. at 1627; *Runyon*, 427 U.S. at 185, 96 S. Ct. at 2601. The words "necessary costs of response" do not expressly authorize an award of attorneys' fees for legal expenses incurred in remediating the contamination of property.

Stanton Road argues that we should adopt the Eighth Circuit's interpretation of the words "necessary costs of response." We decline to do so because we are unpersuaded by the Eighth Circuit's analysis of the issue.

The Eighth Circuit's explanation of its holding is contained in the following paragraph:

> As noted earlier, 42 U.S.C. § 9607(a)(4)(B), allows private parties to recover "necessary costs of response . . . consistent with the national contingency plan." 42 U.S.C. § 9601(25) defines "response" as "remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') *including enforcement activities related thereto*." (Emphasis added).

> A private party cost-recovery action such as this one is an enforcement activity within the meaning of the statute. *See Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir. 1988); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986). Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the "necessary costs" that section 9607(a)(4)(B) allows private parties to recover. We therefore conclude that CERCLA authorizes, with a sufficient degree of explicitness, the recovery by private parties of attorney fees and expenses. This conclusion based on the statutory language is consistent with two of the main purposes of CERCLA--prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party. These purposes would be undermined if a non-polluter (such as GE) were forced to absorb the litigation costs of recovering its response costs from the polluter. The litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site.

Litton, 920 F.2d at 1421-22 (emphasis in the original).

We agree with the Eighth Circuit that attorneys' fees are ordinarily expended in a private response action. This truth does not, however, permit a federal court to read into the phrase, "necessary costs of response," explicit congressional authority to award attorneys' fees. Attorneys' fees are incurred in every private action to enforce rights embodied in a federal statute where the litigant is represented by counsel. The cost of representation cannot be shifted

by implication under the American Rule. *Runyon*, 427 U.S. at 185, 96 S. Ct. at 2601. A holding that attorneys' fees are not explicitly authorized in a private response action does not "read them out" of section 9607(a)(4)(B), as suggested by the Eighth Circuit. To the contrary, to uphold the district court's award of attorneys' fees in a private response action, we would have to read into the statute words not explicitly inserted by Congress. The Supreme Court instructed us in *Alyeska* and *Runyon* that we lack such power.

The Eighth Circuit's reliance on the policy underlying CERCLA to support its conclusion that Congress must have intended that litigants may recover attorneys' fees in a private response action is also misplaced. We cannot imply authority to award attorneys' fees because we determine that such a rule would enhance public policy. The Supreme Court rejected this notion in *Alyeska*:

> It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation.... But congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.

Alyeska, 421 U.S. at 263, 95 S. Ct. at 1624.

If Congress determines that an exception to the American Rule is appropriate in private response actions, it will do so in explicit terms as it has previously done in other parts of CERCLA. *See* 42 U.S.C. §§ 9604(b), 9659(f). Because Congress has not explicitly

authorized an award of legal expenses as necessary response costs, the district court had no authority to award attorneys' fees to Stanton Road. *Runyon*, 427 U.S. at 185, 96 S. Ct. at 2601.

III.

Validity of the Award of Monetary Damages for Future Response Acts

1. Mootness

[6] Stanton Road asserts that the validity of the order requiring Lohrey to pay monetary damages in the sum of $1,100,000 is moot because most of the funds placed in the escrow account have been expended to pay for remediation costs. We disagree. Lohrey appeals from the judgment ordering it to pay monetary damages to Stanton. The fact that payments have been made in satisfaction of a money judgment does not foreclose an appeal. *United States ex rel. Morgan & Son Earth Moving, Inc. v. Timberland Paving & Constr. Co.*, 745 F.2d 595, 598 (9th Cir. 1984).

2. Waiver

[7] The parties disagree regarding whether Lohrey objected before the trial court to the validity of the order requiring it to pay $1,100,000 in monetary damages to Stanton Road for deposit in an escrow account. We need not decide whether the issue was raised in the district court because the question whether CERCLA permits the recovery of future response costs is a matter of law, and the challenged order is part of the record. See *White v. McGinnis*, 903 F.2d 699, 700 n.4 (9th Cir.) (en banc) (appellate courts may consider issues raised for first time on appeal if the "issue is purely one of law and the pertinent record has been fully developed") *cert. denied*, 498 U.S. 903, 111 S. Ct. 266, 112 L. Ed.2d 223 (1990) (quoting *United States v. Gabriel*, 625 F.2d 830, 832 (9th Cir. 1980)).

3. Validity of The Award of Future Response Costs Under CERCLA

[8] Lohrey contends that the district court erred in ordering Lohrey to pay Stanton Road $1,100,000 to fund the clean-up of its property, because CERCLA prohibits awards of future response costs. We agree.

In ordering Lohrey to pay future response cost damages, the court believed that it could avoid holding further proceedings at which Stanton Road would be required to show that the costs it incurred were necessary to clean up the contamination and were consistent with the national contingency plan. The district court explained its motivation as follows:

> I am just going to give you a judgment and give you an amount of money of what it would take [to clean up the property]. In these cases the court would have 50,000 cases on their docket waiting some sort of a resolution. I don't know if declaratory relief is really a basis of sense in this case.

Section 107(a)(4)(B) permits a private party to recover costs incurred in responding to the contamination. 42 U.S.C. § 9607(a)(4)(B). CERCLA further provides for a declaratory judgment action to establish liability for future response costs. 42 U.S.C. § 9613(g)(2). Section 9607(a)(4)(B) limits damages in private response actions to expenses that were "necessary" and "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). We held in *Dant & Russell v. Burlington N. R.R. Co.* that CERCLA requires plaintiffs "to actually incur response costs before they can recover them." 951 F.2d 246, 250 (9th Cir. 1991). Thus, the district court erred in ordering Lohrey to pay monetary damages of $1,100,000 for clean-up costs that Stanton Road had not incurred. Furthermore, because Stanton Road had not cleaned up its property at the time the district court entered its judgment, it failed to meet its burden of proving in an adversary

proceeding that its expenses were necessary and incurred in a manner consistent with the national contingency plan. See *Cadillac Fairview*, 840 F.2d at 695 ("To recover costs under section 107(a) the party undertaking the response action must prove that the costs it incurred were 'necessary' and that it incurred those costs in a manner 'consistent with the national contingency plan.'").

The award of monetary damages to Stanton Road to fund a future clean-up of Stanton Road's property violated CERCLA. Therefore, that portion of the award of monetary damages that was based on CERCLA cannot stand.

4. Validity of the Award of Monetary Damages Under State Law

[9] The district court has informed this court that the $1,100,000 monetary damage award was ordered pursuant to both CERCLA and state law. Lohrey contends that an award of monetary damages under state law is invalid because it would permit the plaintiff to circumvent the requirement under CERCLA that response costs be necessary and consistent with the national contingency plan. This argument is meritless.

CERCLA provides that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d). CERCLA further precludes a plaintiff from recovering cost of repair damages under both CERCLA and state law. 42 U.S.C. § 9614(b). Thus, the express language of the statute defeats Lohrey's contention that CERCLA preempts a state law recovery. See *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 127 (3d Cir. 1991) (the prohibition in 42 U.S.C. section 9614(b) against double recovery for removal costs "would be unnecessary and inexplicable if . . . costs that may be recovered under CERCLA may not be recovered under state law").

Lohrey further contends that the district court awarded Stanton Road damages for the diminution in market value of its property under state law. Lohrey argues that the award of monetary damages in the sum of $1,100,000 will result in a double recovery under state law. See *Armitage v. Decker*, 218 Cal. App. 3d 887, 905, 267 Cal. Rptr. 399 (1990) ("[T]he cost of repair . . . and the difference in market value before and after injury are alternate means of achieving [the same] . . . compensation [for tortious injury to property.]") (emphasis added).

Contrary to Lohrey's contention, the district court did not award Stanton Road damages for diminution of the market value of the property due to the contamination. Rather, the district court found that Stanton Road contracted to sell the property for $1,420,000 on September 1, 1988, and that the buyer refused to go through with the sale upon learning of the contamination. On January 31, 1990, Stanton Road entered into a contract with another buyer to sell the property, with the sale being contingent on Stanton Road's remediation of the property. The district court awarded Stanton Road $199,159, representing the loss of use of $1,420,000 from September 1, 1988 to January 31, 1990 at 9.25% interest. The district court also awarded damages to Stanton Road for expenses incurred in maintaining the property from September 1, 1988 to January 31, 1990. The award of damages was not intended to compensate Stanton Road for the lost market value of the property.

IV.

CONCLUSION

The award of monetary damages for future response costs violated CERCLA and must be vacated. The district court failed to indicate what portion of the monetary damages awarded to Stanton Road was compensation for the costs of repair based on a finding of liability under the state law claims.

Accordingly, we vacate the award of monetary damages. Upon remand, the district court is directed to conduct further proceedings.

Before awarding any response costs under CERCLA, the district court must require Stanton Road to meet its burden of proof under section 9607(a)(4)(B) that any clean up expenses it incurred were necessary and consistent with the national contingency plan. If the court determines that damages should be awarded under state law, it is requested to prepare express findings and conclusions of law that specify the cost and the nature of the repairs attributable to a violation of state law.

VACATED and REMANDED with directions.

CANBY, Circuit Judge, dissenting:

With all respect, I cannot agree with two major conclusions reached by the majority. In my view, plaintiff's attorneys' fees are properly recoverable under section 107(a)(4)(B) and the amended version of section 101(25) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607(a)(4)(B) and 9601(25). In addition, I would not reserve the district court's establishment of an escrow fund, nor would I reach the question of that court's power to create such a fund, because I believe that this issue was never properly raised by the defendants in the district court.[1]

Attorneys' Fees

The plaintiff, Stanton Road, owns land that the defendants contaminated by repeated discharges of perchlorethelene over a period of years. Accordingly, Stanton Road is entitled under section 107(a)(4)(B) of CERCLA to recover from the defendants its "necessary costs of response." When CERCLA was first enacted, "response" was defined in section 101(25), 42 U.S.C. § 9601(25), as follows: "'respond' or 'response' means remove, removal, remedy, and remedial action." Had this case arisen between 1980 and 1986,

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[1] I agree with the majority's conclusion that the case is not moot, and with its treatment of the validity of the damages award under state law.

then, Stanton Road would have been entitled to recover its "costs of remedial action." Those recoverable costs might reasonably have been interpreted to be only those incurred in the physical cleanup of the site.

In 1986, however, Congress enacted the Superfund Amendment and Reauthorization Act, which amended section 101(25) of CERCLA to provide: "The terms 'respond' or 'response' means remove, removal, remedy, and remedial action, *all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto.*" (Emphasis added). In the scheme of CERCLA, this language must mean that private plaintiffs can recover the attorneys' fees expended in enforcing the liabilities that CERCLA imposes on polluters.

CERCLA is to a large degree a machine driven by private litigation or the threat of it. As the plurality opinion of the Supreme Court in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed.2d 1 (1989), observed:

> Congress did not think it enough . . . to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties.

Id. at 21-22, 109 S. Ct. at 2285. Thus our court has not hesitated to characterize private actions under section 107 of CERCLA as "private enforcement actions." *Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986); *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 840 F.2d 691, 694 (9th Cir. 1988).

When Congress amended CERCLA to permit such private litigants, among others, to recover the "costs" of "enforcement activities," it is difficult to imagine what it might have had in mind other than the recovery of attorneys' fees. The "enforcement" of CERCLA by a private party consists in suing to hold the polluter liable. The lion's share of the enforcement cost, as opposed to cleanup cost, will lie in attorneys' fees. Congress cannot have been ignorant of that fact. A private party simply cannot recover its cost of enforcement if it cannot recover its attorneys' fees. If the language of Congress in sections 107(a)(4)(B) and 101(25) is to be given meaning and effect, those fees must be recoverable.

This is the conclusion reached by the only other circuit to have addressed the question.[2] In *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415 (8th Cir. 1990), the Eight Circuit ruled:

> Attorney fees and expenses are necessarily incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the "necessary costs" that section 9607(a)(4)(B) allows private parties to recover. We therefore conclude that CERCLA authorizes, with a sufficient degree of explicitness, the recovery by private parties of attorney fees and expenses. This conclusion based on the

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[2]The question whether private parties could recover litigation costs under section 107(a)(4)(B) was recently presented to the Tenth Circuit, but that court declined to address that broad question. See *United States v. Hardage*, 982 F.2d 1436, 1447 (10th Cir. 1992). It affirmed a denial of the fees on the narrower ground that the district court had not erred in its factual determination that the litigation costs had not been necessary. Id. at 1447-48.

> statutory language is consistent with two of the main purposes of CERCLA--prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party. These purposes would be undermined if a non-polluter . . . were forced to absorb the litigation costs of recovering its response costs from the polluter. The litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site.

Id. at 1422.

The majority here resists reading "costs" of "enforcement activities" to include attorneys' fees because Congress elsewhere has used the phrase "attorneys' fees" or, less explicitly, "legal costs." Of course it would have made our task easier if Congress had used the term "attorneys' fees" in its amendment to section 101(25). But Congress is not confined to a particular linguistic formula; it need only manifest its clear intention to permit the litigant to recover fees. As the Eighth Circuit convincingly demonstrated, Congress has done so in the 1986 amendments to CERCLA.

The majority invokes the "American rule" upheld in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S. Ct. 1612, 1616, 44 L. Ed. 2d 141 (1975), and *Runyon v. McCrary*, 427 U.S. 160, 182-86, 96 S. Ct. 2586, 2600-02, 49 L. Ed. 2d 415 (1976), but that is a rule requiring each party to bear its own attorneys' fees when Congress has not otherwise declared its intent. In *Alyeska*, the statute in issue said nothing remotely touching upon fees; the Court rejected the proposition that fee awards should follow from the fact that Congress had authorized private lawsuits. *Alyeska*, 421 U.S. at 263, 95 S. Ct. at 1624. In *Runyon*, the governing statute merely authorized the federal courts to apply the common law when federal law failed "to furnish suitable remedies." *Runyon*, 427 U.S. at 184, 96 S. Ct. at 2601. *Alyeska* and *Runyon* provide the rule when Congress has not indicated an intent; those two cases should not be

construed to create a presumption against the award of fees that Congress can only overcome by the use of particular language.

I would give the natural contextual meaning to "costs" of "enforcement activities" and hold that those terms authorize the recovery of Stanton Road's attorneys' fees. In so doing, I would avoid the frustration of Congress's purpose of stimulating private cleanup efforts, and would also avoid an unnecessary conflict between circuits.

Escrow Fund

I find in the record no hint that the defendants objected to the creation of an escrow fund from which disbursements would be made as future cleanup costs were incurred. Indeed, the statements of both sides in district court indicated that they contemplated the establishment of some such fund. I would not now entertain an objection raised by defendants that was not presented to the district court.

It is true, as the majority opinion states, that we may consider issues raised for the first time on appeal "if the issue is one of law *and the pertinent record has been fully developed.*" *United States v. Gabriel*, 625 F.2d 830, 832 (9th Cir. 1980) (emphasis added). In my view, the record in this case is anything but fully developed on the question of the propriety of an escrow fund to cover future cleanup costs. Because the parties did not dispute the issue, there is no evidence regarding alternatives to such a fund, or the necessity for it in this case, or the alternative methods of ensuring that disbursements will be for necessary expenses only and will be "consistent with the national contingency plan" as required by section 107(a)(4)(B).

The majority has ruled that the district court erred in setting up the escrow fund because that required the defendants to pay damages for cleanup costs that Stanton Road had not yet incurred. But the disbursements were not to be made from the escrow fund until after the costs had been incurred. The majority apparently concludes

nonetheless that such an arrangement runs afoul of our holding in *Dant & Russell v. Burlington N. R.R. Co.*, 951 F.2d 246 (9th Cir. 1991), that plaintiffs must "actually incur response costs before they can recover them." *Id.* at 250. But *Dant & Russell* involved a flat award for future response costs. In holding that costs could not be recovered before they were incurred, we said:

> This case provides no occasion for defining what "incurred" means--only what it does not mean. Here, we are presented with nothing but bare assertions by BN that BN will perform future cleanup. These assertions do not amount to response costs "incurred" under § 9607(a)(4)(B).

Id. Here the escrow arrangement was based on far more than mere assertions of intended cleanup. The arrangement may be sufficiently concrete to satisfy the definition of costs "incurred." If it is not, the fault is with the defendants. Had they raised an objection to the escrow arrangement in district court, the escrow conditions could have been modified to require the kind of commitment to cleanup that might well be deemed to render the costs "incurred."

CERCLA is relatively new legislation, and our experience with it is still unfolding. Escrow arrangements to cover cleanup costs may prove to be a useful device in effectuating Congress's purposes, particularly when there is a question concerning the continued solvency of the liable polluter. I would not hastily rule out the use of such a tool unless I were convinced that the statute forbade it. I can reach no such conclusion on this scanty record. The issue, I submit, should have been left for a later day, when the parties have properly framed it. Here it has been waived; I would affirm the district court.

APPENDIX D

STANTON ROAD ASSOCIATES, a California partnership, Plaintiff,

v.

LOHREY ENTERPRISES, INC., ELECTRONIC VALET SYSTEMS, INC., DAVID LOHREY and NATHAN PANG, Defendants.

No. C 89 0947 SC

United States District Court for the Northern District of California.

1991 U.S. Dist. LEXIS 5630

April 15, 1991, Decided.

April 15, 1991, Filed.

On Appeal to Ninth Circuit.

Before: SAMUEL CONTI, United States District Judge.

This case came on for hearing without a jury April 2, 3, 4, and 8, 1991 before the Honorable Samuel Conti. Steven Hock and Greg Block appeared for plaintiff Stanton Road Associates; Susan Watson and Richard Nosky Jr. appeared for defendants Lohrey Enterprises, Inc., Electronic Valet Systems, Inc., David Lohrey and Nathan Pang. The suit involves a private action under state and federal law for damages, cleanup and other relief by an owner of commercial property who contends that dry cleaning operations on adjoining property resulted in illegal contamination of its property with hazardous wastes. The court having considered all the evidence before it at trial and the briefs and argument of counsel, makes the following findings of fact and conclusions of law.

I.

FINDINGS OF FACT

1. Plaintiff in this action, Stanton Road Associates ("Stanton"), is a California limited partnership formed in 1987. George Sheldon ("Sheldon"), an individual, has been the general partner of Stanton since its formation, and Sheldon's two children have been the limited partners. Prior to 1987, Sheldon was employed by the Curley Bates Company ("Curley Bates"), a sporting goods firm of which he became president and sole shareholder in 1976. At all relevant times, Stanton was the owner of property located at 860 Stanton Road, Burlingame, California ("Stanton Road Property").

2. Defendants in this action are Lohrey Enterprises, Inc. ("Lohrey Enterprises"), a California corporation; Electronic Valet Systems, Inc. ("Electronic Valet"), a California corporation; David Lohrey ("Lohrey"), an individual; and Nathan Pang ("Pang"), an individual.

3. Prior to June 9, 1987, Electronic Valet's corporate name was West Coast Valet Services, Inc. ("West Coast Valet"). At all relevant times, Electronic Valet, formerly West Coast Valet, occupied property at 855 and 857 Malcolm Road, Burlingame, California ("Malcolm Road Property").

4. Lohrey Enterprises was formed as a partnership in 1971 and was incorporated in 1975. As of 1982, Lohrey and his brother, Arthur Lohrey, were the shareholders of Lohrey Enterprises. In 1986, Lohrey acquired Arthur Lohrey's shares of Lohrey Enterprises and became the chairman, president, and sole shareholder of Lohrey Enterprises.

5. The two contiguous parcels of real property involved in this action, the Malcolm Road Property and the Stanton Road Property, are separated by approximately twenty feet of earth ("the Alley") which is unimproved except for certain utility lines and boxes. The property line between the properties runs down the

middle of the Alley. At all relevant times, the rear door of the building on the Malcolm Road Property opened out on the Alley.

6. Curley Bates owned the Stanton Road Property from 1962 to 1987, when Stanton acquired it. On January 31, 1990, Stanton sold the property to Alberto Manuel and Marta Rodriguez and Stephen J. Russell and Stephanie J. Morgan-Russell, who have owned the property since.

7. As of June 1, 1982, the Bank of California owned the Malcolm Road Property as the trustee/lessor. In December 1986, Lohrey and his wife, Elizabeth Danel, became the owners of the Malcolm Road property, and have owned it since.

8. The building on the 855 portion of the Malcolm Road Property has been used for a commercial dry cleaning operation from 1982 to present, first by West Coast/Electronic Valet until 1988, and then by a third party from 1988 to present.

9. Lohrey, Lohrey Enterprises and Pang actively participated in establishing the West Coast Valet commercial dry cleaning business: Lohrey, acting as an individual and on behalf of Lohrey Enterprises, prepared business plans and financial projections and procured a line of credit; Lohrey Enterprises leased the Malcolm Road Property for West Coast Valet's business and guaranteed a line of credit for West Coast Valet; and Pang prepared its business and financial plans, researched the market, solicited business, located a site, and hired employees.

10. Lohrey, Lohrey's brother Arthur Lohrey, and Pang initially owned West Coast Valet in the following capacities, respectively: 37.5%, 37.5%, and 25%. The three had an understanding that over time, they would each own 33.3%. In 1986, Lohrey acquired Arthur Lohrey's ownership interest.

11. From June 9, 1986 through June 8, 1987, Pang and Lohrey considered Pang to be "vice president" of West Coast Valet. Lohrey and his brother interchangeably considered themselves "president" of West Coast Valet.

12. From June 9, 1982 through June 9, 1987, Lohrey and Pang were actively involved, through regular meetings, in managing the business affairs of West Coast Valet.

13. A July 1987 private placement memorandum distributed to potential investors in Electronic Valet stated "in 1982 Lohrey Enterprises, Inc. founded West Coast Valet Services, Inc. . . . " West Coast Valet was also identified and held out as a "subsidiary" of Lohrey Enterprises, and as a "Lohrey Enterprises" Company.

14. Lohrey was the sole incorporator of West Coast Valet in June of 1982. From June 1982 through June 8, 1987, West Coast Valet had no board of directors, no minutes of board meetings, no bylaws, no issued stock, and no elected or appointed officers. Neither Lohrey nor Pang paid any capital into or invested any money in the business of West Coast Valet in exchange for their ownership interests. Neither of the two, nor any other purported owner of West Coast Valet, paid capital into, invested in, or risked their own money or assets in connection with West Coast Valet during the period from 1982 to 1987.

15. The funds necessary to begin operating the West Coast Valet commercial dry cleaning business were provided by a line of credit from Bank of the West, procured by Lohrey and guaranteed by Lohrey Enterprises. In consideration for the line of credit the Bank of the West received, among other things, a security interest in any unencumbered assets of the West Coast Valet commercial dry cleaning operations.

16. West Coast Valet opened for business in 1982 and operated at a loss for several months. Thereafter it began to profit, and continued to do so until it was sold in 1988. At least half of such profits were regularly distributed to Lohrey and Pang as owners of West Coast Valet as "dividends" and converted to their personal use, even though no stock had been issued.

17. On June 30, 1987, West Coast Valet changed its name to Electronic Valet. Its board of directors (Lohrey, Lohrey's wife, and Pang) adopted by-laws and elected officers. Lohrey was elected

chairman of the board, president and chief executive officer; Pang was elected vice president.

18. Soon thereafter Lohrey combined (in his words, "merged") the business of Electronic Valet with the business of West Coast Laundry Machinery, Inc. Lohrey planned to offer preferred stock in Electronic Valet to investors to market certain automated valet service units. However, the offering ultimately failed to attract investors on terms suitable to Lohrey and Pang, and the marketing plan was wound down.

19. In August 1987, Electronic Valet issued to Lohrey and his wife 3,750,000 shares of common stock, for total consideration of one dollar.

20. As of June 30, 1986, West Coast Valet had retained earnings of $146,128 and net income from the past year of $21,952. As of June 30, 1987, Electronic Valet was projected to have an accumulated deficit of $72,996, capital from the sale of common stock of $1.00 and a net loss for the past year of $219,124. Electronic Valet was projected to have loans of $441,674, obligations under capital leases of $503,849 and payables of $226,354.

21. On July 14, 1988, Electronic Valet's commercial dry cleaning operation was sold to a third party for cash, and the proceeds were distributed to creditors, to Lohrey Enterprises for purported "debts," and to Lohrey and his wife individually.

22. From 1982 through 1988, perchlorethelene ("perc"), a toxic chemical and "hazardous substance" under CERCLA, was used continuously in the dry cleaning operation on the Malcolm Road Property.

23. In 1982, both Lohrey and Pang knew that perc was a volatile and flammable liquid, and that it had a unique, strong odor. Pang also knew that perc was delivered in a vehicle similar to a gasoline truck, and he observed that perc was destroying plastic piping in the dry cleaning equipment.

24. During the period from 1982 to 1985, a reasonable person having knowledge of the facts described in the preceding paragraph should and would have known that perc was toxic and dangerous if released into the environment.

25. On three occasions beginning in 1982, Pang observed perc spilling from the drycleaning systems and flowing out the door into the Alley due to the slant of the floor. The perc was left in the Alley to dry.

26. In 1983 Pang was informed of at least three more such incidents by West Coast Valet Manager Robert Curtis. Mr. Pang recalls that the spills continued through 1985. Additional disposal of perc to the Alley occurred when sludge was dumped out the back door from the "cooker."

27. Perc has been listed as a hazardous waste since 1979 by the state, and since 1980 by the EPA.

28. In 1985 the City of Burlingame notified West Coast Valet to stop dumping sludge into the Alley, and cited it for disposing of perc in the public sewer system.

29. In 1985 Pang received materials informing him that perc is a hazardous substance. On August 3, 1988 Pang received a Cease and Desist Order from attorneys for Stanton. After receiving this order, Electronic Valet notified the Regional Water Quality Control Board that it had not discharged hazardous waste at any time.

30. West Coast Valet's disposal of perc into unlined soils in the Alley violates federal and state statutes. Its failure to notify regulatory authorities of the perc spills violates federal law.

31. On December 4, 1989, Dirk Jensen of the San Mateo County Health Department notified Lohrey that he was in violation of California Health and Safety Code Sections 25254 and 25189.5. On March 13, 1990, he notified Lohrey a second time of the violations and directed that Lohrey submit a corrective action plan to the county within ten days.

32. To date, the county has not received a corrective action plan or any other reports from any of the named defendants. None of the defendants has taken any action to clean up the Stanton Road Property.

33. According to expert opinion, it is estimated that it would take about three years and would cost approximately $775,000 to clean up the Stanton Road Property to conform to government regulations regarding levels of perc. The $775,000 figure includes a contingency factor of plus or minus 40%. That is, the cleanup could cost as little as 40% less than $775,000, or as much as 40% more than $775,000.

34. The minimum amount of funding available that would be necessary for an environmental firm to be willing to undertake the cleanup of the Stanton Road Property would be $1,100,000. There was no evidence presented as to any lesser amount acceptable to an environmental firm to do the cleanup.

35. From 1963 to 1986, Curley Bates occupied the Stanton Road Property. In 1986 Easton Development Corporation ("Easton") began occupying the premises pursuant to a lease agreement with Curley Bates dated December 2, 1985, under which Easton would lease the premises through September 1, 1988. Under the lease agreement, Curley Bates could exercise a "put" right (require Easton to purchase the property) by giving Easton notice of exercise of the right on September 1, 1988.

36. Pursuant to the lease agreement, on August 1, 1988 Easton provided Stanton with an appraisal of the fair market value of the Stanton Road Property at $1,340,000. Attached to the appraisal was the August 1987 report of Blymer & Sons Engineering Company concerning the presence of hazardous chemicals on the property. This was Sheldon's first notice of contamination of the Stanton Road Property.

37. Upon learning of the contamination, Stanton retained the environmental consulting firm of Harding Lawson Associates ("HLA") to investigate. HLA reported that the Stanton Road

property was contaminated with perc from the West Coast Valet drycleaning operation.

38. In August 1988 Sheldon and Easton agreed to have the Stanton Road Property appraised a third time, and to have the appraisal made under the assumption that the property was not contaminated. They agreed to extend the purchase date under the agreement from September 1, 1988 to October 1, 1988 in order to get the third appraisal and investigate the contamination. Easton communicated that it would not proceed with the purchase of a contaminated property.

39. On September 9, 1988, the third appraisal valued the property at $1,420,000 in an uncontaminated state. Stanton was prepared to proceed with the sale at this price. However, Easton confirmed in a May, 1989 letter that it would not proceed with the purchase due to the contamination.

40. But for the contamination, Stanton would have made a cash sale to Easton for $1,420,000.

41. Thereafter Stanton made all reasonable efforts to mitigate its damages from the lost sale, incurring various expenses in those efforts. In 1989, Stanton rented a portion of the property for a total of $3,000. On January 31, 1990, Stanton sold the Stanton Road Property to Alberto Manuel and Marta Rodriguez, and Stephen J. Russell and Stephanie J. Morgan-Russell (collectively, "Alrod") for a purchase price of $1,425,000.

42. The terms of the sale to Alrod included: Stanton's agreement to clean up the property to comply with government standards within three years of January 31, 1990; seller financing by Stanton by taking back a note from the buyers for a face amount of $1,111,500, secured by a first deed of trust on the Stanton Road Property; and Stanton's indemnity of the buyers for expenditures and liability they might incur because of the contamination.

43. As a direct and proximate result of defendants' conduct and the contamination of the Stanton Road Property, Stanton has suffered the damages listed below:

a. Stanton lost the use of the $1,420,000 cash it would have gotten from the sale to Easton for the period from September 1, 1988 through January 31, 1990. Deposited, this amount would have earned interest at 9.25% compounded daily, for a total return to Stanton of $199,159.

b. Also between September 1, 1988 and January 31, 1990: Stanton paid real property taxes on the Stanton Road Property of $23,665; it paid $7,069 for insurance and maintenance costs on the property; it paid $1,000 in real estate commission on the 1989 rental described above; it paid $2,500 to repair the roof of the building on the property; and it paid a real estate brokerage commission of $85,500 in connection with the sale to Alrod.

c. To date, Stanton has paid HLA $77,374 for its environmental consulting work on the property.

d. Stanton, through its general partner Sheldon, has suffered annoyance and inconvenience. $75,000 is reasonably necessary to compensate for this damage. This amount includes any difference in the sale price of the Stanton Road Property due to appreciation in the real estate market.

e. In responding to the contamination, Stanton has incurred attorney fees and costs.

II.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this action pursuant to § 113(b) of CERCLA (42 U.S.C. § 9613(a)), 28 U.S.C. § 1331, and jurisdiction pendent thereto.

2. Since the release and wrongful acts took place in San Mateo County, venue lies in this court pursuant to 28 U.S.C. § 1391(b) and 42 U.S.C. § 9613(b).

3. Defendants are liable for the recovery of response costs pursuant to 42 U.S.C. § 9607(a); Stanton is entitled to a declaration that defendants are liable for all future response costs and for costs incurred for cleanup, as required by Stanton's contract with the present owners of the Stanton Road Property; defendants trespassed onto Stanton's property; defendants were negligent in causing the contamination; defendants created a nuisance; and defendants are liable for indemnification and contribution.

4. Perc is a "hazardous substance" under 42 U.S.C. § 9601(14), 40 C.F.R. § 302.4 and 40 C.F.R. § 261.31.

5. The defendants released contaminants into the Alley and surrounding area within the meaning of "release" in 42 U.S.C. § 9601(22).

6. An award of attorney fees as part of "enforcement activities" related to response in a private action under CERCLA is justified by the language of the statute and is consistent with CERCLA's legislative intent. CERCLA § 101(25), 42 U.S.C. § 9601(25); *see General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1422; *Pease & Curren Refining, Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945 (C.D. Cal. 1990).

7. Stanton's expenditures in investigating, monitoring, and assessing the soils, waters and contiguous environment at the Alley, and attorneys' fees incurred for necessary response costs consistent with the national recovery plan, are recoverable as costs of response pursuant to the relevant definition sections of CERCLA, 42 U.S.C. § 9601(23), (24), and (25).

8. The court has reviewed Stanton's request for attorneys' fees together with its documentation and the defendants' response thereto. The court concludes that attorney fees are proper only with reference to costs of "response" under CERCLA, and that 46% of

the attorneys' fees requested are attributable to response costs. Therefore, the court finds that attorney fees in the amount of $126,197.78 are reasonable "response costs" payable to Stanton.

9. Defendant Lohrey is a liable party pursuant to § 107(a) of CERCLA as a current owner of contaminated property, and as owner at the time of contamination. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

10. Defendants Lohrey, Lohrey Enterprises, Electronic Valet and Pang are strictly liable under § 107(a) as owners and/or operators of the facility during all relevant times.

11. Pursuant to CERCLA all defendants are liable parties. Their acts regarding hazardous substances have already occurred. The future costs of response are necessary and are not unlikely, remote, or speculative. Accordingly, declaratory relief is appropriate at this time in order that Stanton may ascertain its rights against defendants. 42 U.S.C. § 9613(g)(2); 28 U.S.C. § 2201(a).

12. Therefore, plaintiff Stanton is entitled to a declaration that all defendants are jointly and severally liable under CERCLA for all future response costs necessary to address the release and threatened release of hazardous substances from or occasioned by perc and other contaminants generated by defendants at the Stanton and Malcolm Road Properties.

13. In order to ensure payment by defendants of all future response costs necessary to address the contamination of the Stanton Road Property, defendants, jointly and severally, shall pay to Stanton the sum of one million one hundred thousand dollars ($1,100,000). Stanton shall deposit said sum in an interest bearing escrow trust account ("Cleanup Escrow") established to implement the remediation of 860 Stanton Road as expeditiously as possible by the environmental consulting firm PES Environmental, Inc. ("PES"). Defendants shall have no control over the Cleanup Escrow fund, other than to monitor the expenditures therefrom. Payments from the Cleanup Escrow fund for cleanup services rendered shall be paid out as invoices are received and work in reviewed and approved by PES

principals. Copies of the said invoices shall be provided to a party to be designated jointly by all defendants.

14. The Cleanup Escrow will terminate upon written certification from PES that the 860 Stanton Road Property has been remediated in accordance with all relevant regulatory cleanup levels and requirements.

15. If unused funds remain in the Cleanup Escrow at the time of termination, such funds will be distributed as follows:

a. First all unused funds shall be paid out to Stanton in order to satisfy any money damages awarded to Stanton in this judgment that remain unpaid as of the date of termination of the escrow. In the event excess Cleanup Escrow funds remain subsequent to satisfying any unpaid judgment, such funds shall be paid out to defendants on a pro rata basis according to the percentage that each defendant paid funds into the original Cleanup Escrow;

b. In the event all monetary damages awarded Stanton have been satisfied in full upon termination of the Cleanup Escrow, all remaining sums shall be paid out to defendants on a pro rata basis according to the percentage that each defendant paid funds into the original Cleanup Escrow.

16. Trespass occurs when a party unlawfully interferes with another's possession or enjoyment of property. *Staples v. Hoefke*, 189 Cal. App. 3d 1397 (1990). By spilling perc on Stanton's property, and by causing the migration of perc from defendant's property to Stanton's property without Stanton's consent, defendants unlawfully interfered with Stanton's property and thereby committed trespass.

17. For the trespass, defendants are liable for the consequential damages and for the annoyance and inconvenience caused by the trespass. *Kornoff v. Kingsburg Cotton Oil Co.*, 45 C.2d 265, 272 (1955).

18. Three elements are necessary to establish negligence: 1) defendants' legal duty to use due care; 2) defendants' breach of that duty; 3) proximate causation of plaintiff's damages. *Nally v. Grace Community Church*, 47 C.3d 278 (1988).

19. Defendants had a duty to use due care when dealing with contaminants to avoid causing injury to Stanton, and to remedy any injury they caused by contamination.

20. Defendants failed to use ordinary care in the disposal of perc in light of their possession of information that would put a reasonable person on notice that it should not be discharged into the environment. They are also charged as a matter of law with an awareness of laws and regulations dealing with hazardous waste and chemicals. *Liquid Chemical Corp. v. Department of Health Services*, 227 Cal. App. 3d 384, 403 (1991).

21. Defendants breached their duty by using and disposing of perc in the Alley during the course of their operations as an industrial scale dry cleaning operation. Defendants further breached their duty of due care by failing to remedy the injury to plaintiff caused by the release of contaminants in the Alley.

22. As a direct and proximate result of defendants' negligence, Stanton has incurred damages for which defendants are liable.

23. Nuisance requires proof that the defendants caused an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of property. Cal. Civ. Code § 3479; *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283 (N.D. Cal. 1984); *Wolford v. Thomas*, 190 Cal. App. 3d 347 (1987).

24. Defendants' acts and omissions regarding release of the contaminants into the soil and groundwater in the Alley interfered with Stanton's free use and comfortable enjoyment of the Stanton Road property. As a direct and proximate result of defendants' acts and omissions, Stanton has incurred damages for which defendants are liable under the law of nuisance.

25. Notwithstanding compliance with statutory requirements for the creation and operation of a corporation, the corporate entity may be disregarded to assure a just and equitable result. *See* Ballantine, *California Corporations Laws*, § 295 *et seq.* at pp. 14-32 (4th Ed. 1990). For the corporate entity to be disregarded, the circumstances of the particular case must be such that 1) there is such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and 2) if the acts are treated as those of the corporation alone, an inequitable result will follow. *Automotriz del Golfo de California v. Resnick*, 47 Cal. 3d 792 (1957). Two principal areas of inquiry are the extent to which a corporation is adequately capitalized throughout its operations to meet liabilities and the degree to which corporate formalities are followed. *Id.*

26. Defendants' failure to: adequately capitalize West Coast Valet/Electronic Valet; issue stock; maintain minutes and adequate records; hold board meetings; and observe corporate formalities constitutes such a unity of interest of the corporation and the individuals that the separate personalities of the corporation and individuals no longer exist.

27. Unless the corporate entity is disregarded and the individual defendants are held liable, injustice will result in that an innocent neighbor will have to bear the cost of cleanup and other damages.

28. Based on the evidence in this case, defendants, each and every one of them, are jointly and severally liable to Stanton for all damages incurred by Stanton in connection with the contamination of Stanton's property, despite their acting through a corporation.

29. The measure of damages for tortious injury to property is the amount which will compensate for all the detriment proximately caused by the tortious act, whether it could have been anticipated or not. Cal. Civ. Code § 3333; *Armitage v. Decker*, 218 Cal. App. 3d 887 (1990).

30. Based on the foregoing facts, Stanton has incurred damages as follows:

a.	Loss of use of $1,420,000 from September 1, 1988 (lost Easton sale) to January 31, 1990 (Alrod sale) (518 days at 9.25%)	$199,159
b.	Out-of-pocket expenses for carrying of property from September 1, 1988 to January 31, 1990	
	Real property taxes of $23,665 less rent received on short-term lease of $3,000	$20,665
	Insurance and maintenance	$7,101
	Roof repair	$2,500
c.	Real estate commission on January 31, 1990 Alrod sale which would not have been incurred for lost Easton sale	$85,500
d.	Annoyance and inconvenience (trespass)	$75,000
e.	Environmental response costs	
	Liquidated damages	$70,174
	Additional amount testified to at trial	$7,200
f.	Attorney fees	$126,198
g.	Cleanup costs to be placed in escrow	$1,100,000
h.	Costs of suit	

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEY TRONIC CORPORATION, a Washington Corporation, Plaintiff-Appellee, v. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE AIR FORCE; DONALD B. RICE, Secretary of the United States Air Force, in his official capacity, Defendants-Appellants.	NO. 91-36021 D.C. No. CV-89-694-JLQ ORDER

Before: SNEED, ALARCON, and CANBY, Circuit Judges.

Judge Sneed and Judge Alarcon vote to deny the petition for a rehearing and recommend rejection of the suggestion for rehearing en banc. Judge Canby would grant the petition for rehearing and grant the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.